

Nos. 83-245, 83-291

Office - Supreme Court, U.S.

FILED

DEC 12 1983

ALEXANDER L. STEVAS.

**In the Supreme Court of the United States**

OCTOBER TERM, 1983

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PENSION BENEFIT GUARANTY CORPORATION,  
*Appellant,*

*v.*

R.A. GRAY & COMPANY,  
*Appellee.*

---

OREGON-WASHINGTON CARPENTERS-  
EMPLOYERS PENSION TRUST FUND,  
*Appellant,*

*v.*

R.A. GRAY & COMPANY,  
*Appellee.*

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APPEAL FROM THE UNITED STATES  
COURT OF APPEALS FOR THE NINTH CIRCUIT

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**JOINT APPENDIX**

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[List of Counsel on Inside Cover]

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**JURISDICTIONAL STATEMENTS FILED**  
**AUGUST 15, 1983 (No. 83-245) AND**  
**AUGUST 19, 1983 (No. 83-291)**  
**PROBABLE JURISDICTION NOTED OCTOBER 17, 1983**

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PENSION TRUST FUND

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### CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

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1981

- September 29 Filed Complaint, Plaintiff R.A. Gray & Co.'s Application for Preliminary Injunction and for Order to Show Cause, and supporting points and authorities
- October 6 Filed Gray's Motion for Expedited Hearing and/or Application for Temporary Restraining Order
- October 23 Filed Defendant Oregon-Washington Carpenters-Employers Pension Trust Fund's Motion for Summary Judgment and Supporting Affidavit and Memorandum
- October 23 Filed Gray's Memorandum in Support of Temporary Restraining Order and Preliminary Injunction and Affidavit of John R. Bentley With Exhibits
- November 2 Filed Defendant Pension Benefit Guaranty Corporation's Motion to Accept Late-Filed Brief, with supporting points and authorities, and Statement of Reasons and Authorities of Defendant Pension Benefit Guaranty Corporation in Opposition to Gray's Preliminary Motions
- November 6 Filed Gray's Motion for Summary Judgment
- November 16 Record of Hearing on Motion for Preliminary Injunction and Motions for Summary Judgment
- November 16 Enter Order denying Gray's Motion for Preliminary Injunction, opinion forthcoming
- November 19 Filed Gray's Motion for Reconsideration
- November 20 Enter Order Denying Gray's Motion for Reconsideration

(IV)

December 1	Enter Memorandum Opinion and Order Denying Gray's Motion for Preliminary Injunction
December 4	Filed Answer of PBGC
1982	
April 7	Filed Affidavit of Thomas M. Triplett with Exhibits
April 16	Filed Motion of PBGC for Summary Judgment and Memorandum of Points and Authorities in Support of PBGC's Cross-Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment
July 7	Record of Hearing on Motions for Summary Judgment
August 11	Enter Memorandum Opinion and Order Granting PBGC's and Trust Fund's Motions for Summary Judgment and Denying Gray's Motion for Summary Judgment
August 12	Enter Judgment Granting Defendants' Motions for Summary Judgment and Dismissing Action
September 10	Filed Gray's Notice of Appeal
1983	
May 20	Filed Opinion of Court of Appeals
May 20	Filed Judgment of Court of Appeals
June 15	Filed PBGC's Notice of Appeal to the Supreme Court of the United States
June 20	Filed Trust Fund's Notice of Appeal to the Supreme Court of the United States
August 15	Filed PBGC's Jurisdictional Statement (No. 83-245)
August 19	Filed Trust Fund's Jurisdictional Statement (No. 83-291)
October 17	Probable Jurisdiction Noted

[Names of Counsel Omitted in Printing]  
IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

Civil Action No. 81-912-RE

R. A. GRAY & Co., PLAINTIFF,

v.

OREGON-WASHINGTON CARPENTERS-EMPLOYERS PENSION  
TRUST FUND AND PENSION BENEFIT GUARANTY CORPORATION,  
DEFENDANTS

---

COMPLAINT FOR DECLARATORY  
JUDGMENT AND OTHER RELIEF

I.

JURISDICTION

This action arises under the U.S. Const. art. I, § 9 and U.S. Const. amend. V and VII, and also under the provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*, as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), P.L. 96-364, both as more fully alleged below.

This court has jurisdiction under 28 U.S.C. §§ 1331 [2] and 1337 and under 29 U.S.C. §§ 1305(f) and 1451(a)(1). The amount in controversy, exclusive of interest and costs, exceeds \$10,000.00.

II.

PARTIES

Plaintiff R. A. Gray & Co. ("Gray") is a corporation organized under the laws of the state of Oregon and was, at all times material hereto, a signatory of successive bargaining agreements with the Oregon Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, and constituent locals thereof ("the Union"), and has been, as provided by the terms of those agreements, a contributor to a multiemployer plan ("the Plan") within the meaning of 29 U.S.C. § 1002(37).

Defendant Oregon-Washington Carpenters-Employers Pension Trust Fund ("the Trust") is a trust organized under the laws of the State of Oregon and the United States, and is the plan sponsor which administers the Plan.

Defendant Pension Benefit Guaranty Corporation ("the Corporation") is a body corporate, established by 29 U.S.C. § 1302, and charged by law with the implementation and enforcement of ERISA, as amended by MPPAA.

### III.

#### CLAIM FOR RELIEF AGAINST THE TRUST

1. Since 1965 plaintiff Gray has contributed to the Trust a total of \$398,095.56 in accordance with the provisions [3] of successive collective bargaining agreements with the Union which were in force during that time.

2. Each of those collective bargaining agreements was executed prior to April 29, 1980.

3. Under those collective bargaining agreements and the terms of the Plan Gray's sole financial obligation to the Trust was to make the contributions therein provided for. Gray has made those contributions as alleged in Paragraph III(1).

4. On February 14, 1980, Gray gave notice of termination of its collective bargaining agreement, effective June 1, 1980, to the Union and thereafter sought to negotiate a successor agreement.

5. On June 1, 1980 the Union instituted a strike of Gray's business and has continued to picket or strike Gray's premises since that time.

6. On September 26, 1980, Congress enacted MPPAA, purporting to impose new financial liabilities on employers who withdrew from multiemployer plans after April 29, 1980, but not imposing comparable liabilities on employers who are parties to other kinds of plans authorized by ERISA.

7. On July 24, 1981 the Trust notified Gray that it believed Gray withdrew completely from the plan on June 1, 1980, and that it has assessed against Gray a withdrawal liability in the net amount of \$201,359.00 pursuant to the provisions of ERISA as amended by MPPAA. Gray denies

that it has withdrawn from the plan within the meaning of 29 U.S.C. §§ 1383 and [4] 1398(2).

8. The Trust has also notified Gray that unless the first quarterly payment on that assessment is received within 120 days of July 24, 1981 the Trust will invoke penalties for default as authorized by 29 U.S.C. § 1399.

9. Under the provision of 29 U.S.C. §§ 1451 and 1132(g)(2) a penalty may be imposed for default in payment of withdrawal liability.

10. If plaintiff Gray disputes the trust's determination that Gray is subject to withdrawal liability or the amount of that liability Gray must, under the provisions of 29 U.S.C. § 1401, submit to arbitration in which the arbitrator's findings will be presumptively correct and can be rebutted, on review, only by a clear preponderance of the evidence. If Gray does not submit to arbitration the Trust's assessment will, under the provisions of 29 U.S.C. § 1401(b)(1), be due and payable according to its terms and enforceable by action in which Gray cannot dispute the assessment.

11. Unless restrained, the Trust will continue to assert Gray's liability for withdrawal from the plan and will proceed to attempt to collect its assessment in the manner provided in MPPAA, to Gray's damage.

12. By reason of the foregoing, if the Trust is allowed to enforce the withdrawal liability it has purported to assess, the provisions of MPPAA as they affect Gray will:

a. Impair the provisions of the collective [5] bargaining agreements and the Plan to which Gray was a party and deprive Gray of its property without due process of law in violation of U.S. Const. amend. V.

b. Arbitrarily impose retroactive liability on plaintiff Gray for actions and events which occurred before the enactment of MPPAA in violation of U.S. Const. amend. V.

c. Compel Gray to submit any dispute as to the fact or the amount of that liability to arbitration, thus depriving Gray of the right to a jury trial in violation of U.S. Const. amend. V and VII.

d. Arbitrarily impose on Gray a liability which is disproportionate to that imposed on employers who contribute

to other kinds of plans in violation of U.S. Const. amend. V.

e. Authorize the imposition of penalties on Gray based on events which occurred before the enactment of MPPAA in violation of U.S. Const. art. I, § 9.

#### IV.

#### CLAIM FOR RELIEF AGAINST THE CORPORATION

1. Plaintiff Gray realleges, and incorporates here by reference, all of the allegations of Paragraph III above.

2. The Corporation is the body charged by Congress with implementation of ERISA as amended by MPPAA and has announced its intention to formulate and promulgate regulations to facilitate and carry out the assessment and collection of [6] withdrawal liabilities and has proceeded to adopt certain regulations according to its announced intention.

3. Unless Gray is granted the relief requested in this proceeding, the corporation will proceed with plans to implement and facilitate, by advice and regulation, the assessment and enforcement of withdrawal liabilities against Gray and others similarly situated who withdrew, or purportedly withdrew, from multiemployer plans prior to the enactment of MPPAA.

#### PRAYER

WHEREFORE plaintiff Gray prays for a judgment and decree as follows:

1. Temporarily, preliminarily and permanently enjoining the Trust from collecting or taking any steps provided for in ERISA, as amended by MPPAA, toward collecting the purported withdrawal liability which it has claimed to assess against Gray; and

2. Declaring the withdrawal liability provisions of MPPAA to be invalid and unenforceable against employers who are parties to multiemployer plans under contracts executed before the effective date of those provisions which contracts do not provide for such liabilities; or

3. As an alternative to the relief requested in Paragraph 2 of the Prayer, declaring the withdrawal liability provisions of MPPAA to be invalid and unenforceable against em-

ployers who withdrew from such multiemployer plans prior to the date those provisions were enacted;

[7] 4. Declaring the compulsory arbitration provisions of MPPAA to be invalid and unenforceable as to employers who have not consented to submit the disputes therein provided for to arbitration; and

5. Declaring the penalty provisions of the said law to be in contravention of U.S. Const., art. I, § 9.

6. Awarding to plaintiff its costs and expenses, including reasonable attorney fees, incurred in this action.

7. Granting such additional and further relief as may be appropriate to declare and protect plaintiff's rights.

By: /s/ Thomas M. Triplett

---

THOMAS M. TRIPLETT  
of Attorneys for Plaintiff  
R. A. Gray & Co.



**MEMORANDUM IN SUPPORT OF DEFENDANT TRUST  
FUND'S MOTION FOR SUMMARY JUDGMENT**

**[Caption Omitted in Printing]**

\* \* \*

**[2] B. Statement of Facts.**

Plaintiff is an Oregon corporation which formerly was a party to collective bargaining agreements with the Oregon Council of Carpenters, United Brotherhood of Carpenters and Joiners of America and constituent locals thereof. Pursuant to the terms of these collective bargaining agreements, Plaintiff contributed to the Oregon-Washington Carpenters-Employers Pension Trust Fund, a defendant herein (hereinafter "Trust [3] Fund"), on behalf of its employees employed in the bargaining unit covered by the collective bargaining agreements. The assets of the Trust Fund are held by the trustees thereof for the purpose of providing retirement and related benefits in accordance with the provisions of the plan adopted pursuant to the Trust ("Plan").

The Trust Fund is an employee benefit plan to which more than one employer is required to contribute and which is maintained pursuant to more than one collective bargaining agreement and is therefore a multiemployer pension plan within the meaning of MEPPAA, 29 USC § 1301. The Plan primarily covers employees in the building and construction industry and it is believed that substantially all the employees on whom Plaintiff contributed worked in the building and construction industry. See 29 USC § 1383(b)(1).

On or about February 14, 1980, Plaintiff gave notice of termination of its collective bargaining agreement, effective June 1, 1980, and has withdrawn from the Plan within the meaning of 29 USC § 1383.

The trustees notified Plaintiff of its withdrawal liability and demanded payment in accordance with a schedule of payments which was provided along with said notice. (The notice and schedule of payments are attached as Exhibit B to the Affidavit of Dolores Taylor filed in support of this Motion for Summary Judgment.)



[4] Plaintiff has requested that the trustees review some eight matters in connection with the demand. See 29 USC § 1399(b)(2). Plaintiff has made no payments of its withdrawal liability and is delinquent. See 29 USC § 1399(c)(4). Plaintiff was notified of the delinquency and that it will be in default if the delinquent payment and interest are not paid within 60 days after receipt of that notice. See 29 USC § 1399(c)(5).

\* \* \*

**AFFIDAVIT IN SUPPORT OF DEFENDANT TRUST  
FUND'S MOTION FOR SUMMARY JUDGMENT**

[Caption Omitted in Printing]

STATE OF OREGON                    )  
  ) SS  
COUNTY OF MULTNOMAH )

I, DOLORES TAYLOR, the trust administrative officer for United States National Bank of Oregon, fund manager for the Oregon-Washington Carpenters-Employers Pension Trust Fund, being first duly sworn, depose and say:

[2] That, on July 24, 1981, on behalf of the Board of Trustees, I had deposited in the United States Post Office at Portland, Oregon, addressed to:

R. A. Gray & Co.  
P. O. Box 23516  
Tigard, Oregon 97223

the attached notice of withdrawal liability and demand for payment dated July 24, 1981, together with the attached schedule of payments.

/s/ [Dolores Taylor] \_\_\_\_\_

DOLORES TAYLOR

SUBSCRIBED and sworn to before me this 22nd day of October, 1981.

/s/ \_\_\_\_\_

Notary Public for Oregon

My commission expires: Aug. 3, 1984

[3] OREGON-WASHINGTON CARPENTERS-EMPLOYERS  
TRUST FUNDS

ADMINISTRATOR • TRUST DEPARTMENT, U.S. NATIONAL BANK OF OREGON  
321 S.W. SIXTH AVENUE P.O. BOX 3168 PORTLAND, OREGON 97208 • PHONE 225-6111

July 24, 1981

R. A. Gray & Co.  
P. O. Box 23516  
Tigard, Oregon 97223

Subject: Notice of Withdrawal Liability and Demand  
for Payment

Gentlemen:

By reason of the cessation of your Master Labor Agreement obligation to contribute to the Oregon-Washington Carpenters-Employers Pension Trust Fund and your continuation of work in the jurisdiction of the Master Labor Agreement of the type for which contributions were previously required, you had a complete withdrawal from the Pension Trust Fund on June 1, 1980.

The total amount of your withdrawal liability, pursuant to Section 4211(b) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), is \$201,305 [sic]. That liability was computed as follows and is further described in Exhibit I hereto:

Unfunded vested benefits 6-30-79	×	Withdrawing employer contributions required 7-1-74 thru 6-30-79	=	Withdrawal liability
		<u>All employer contributions made 7-1-74 thru 6-30-79 excluding substantial withdrawn employers</u>		

\$27,254,900	×	\$ 242,448*	=	\$201,359
		<u>\$32,818,093</u>		

\*Quotient rounded to four decimal places.

[4] Exhibit I also contains the payment schedule for that liability. The Board of Trustees hereby demands payment of the foregoing withdrawal liability amount in accordance with Exhibit I and this letter. The initial withdrawal liability payment must be made no later than 60 days after the date of

demand. Subsequent, quarterly payments must be made by January 1, April 1, July 1 and October 1 of each year with the final payment made by October 1, 1984. You may prepay all or any part of the annual withdrawal liability payments plus accrued interest without penalty.

ERISA Section 4219(c)(5) provides that should you fail to make any payment when due and do not cure such failure within 60 days after notice by the Fund, you will be in default. In the event of default, the Trustees require full payment of all unpaid amounts, together with interest from the due date of the first payment not timely made at rates based on prevailing market rates in accordance with federal regulations.

Within 90 days from the date you receive this notice, you may:

- (A) Ask the Board of Trustees to review any specific matter relating to the determination of your liability and the schedule of payments;
- (B) Identify to the Board of Trustees any inaccuracy in your withdrawal liability; and
- (C) Furnish the Board of Trustees with any additional relevant information.

See ERISA Section 4219(b) regarding this procedure.

You are required by ERISA to make the quarterly payments, notwithstanding any request for review or appeal of the determination of the amount of your liability or the schedule of payments.

For your information, the foregoing withdrawal liability determination is based on the adoption of the following rules by Plan amendment:

1. In determining the denominator of the withdrawal liability fraction, the Board of Trustees adopted the Pension Benefit Guaranty Corporation option of excluding only the contributions of significant withdrawn employers who have previously withdrawn, namely those contributing the lesser of \$250,000 or 1 percent in any of the relevant years.

- [5] 2. Employer contributions received in July and delinquent employer contributions received in August

of each calendar year are allocated to the prior July 1 through June 30 plan year.

3. The annual withdrawal liability payment is determined using employer contribution base units (covered hours) in the five-year period ending June 30, 1979.

Very truly yours,

/s/ Dolores M. Taylor

---

DOLORES M. TAYLOR

cc: Co-Legal Counsel

[6]

**EXHIBIT I****WITHDRAWN EMPLOYER R. A. GRAY & CO.****A. Summary of Withdrawal Liability Calculation**

1. Date Participation Ceased	June 1, 1980
2. Total Contributions of Withdrawn Employer to the Plan, for 5 Fiscal Year Period Ended June 30, 1979	\$ 242,448
3. Total Contributions of All Participating Employers for 5 Fiscal years Period Ended June 30, 1979	\$32,818,093
4. Contributions as Percentage of Total Contributions	0.7388%
5. Total Withdrawal Liability of Plan as of June 30, 1979	\$27,254,900
6. Withdrawal Liability of Withdrawn Employer—equals (4) times (5)	\$ 201,359
7. De minimus Amount	\$ -0-
8. Net Withdrawal Liability of Withdrawn Employer	\$ 201,359

**B. Calculation of Required Annual Payments**

1. Average Annual Contribution Base (Hours)	65,410
2. Highest Contribution Rate Prior to Withdrawal	\$1.00
3. Required Annual Payment—equal (1) times (2)	\$ 65,410

**C. Payment Schedule:**

\$16,353 per quarter for 13 quarters plus a final payment of \$11,885.

## AFFIDAVIT OF JOHN R. BENTLEY

[Caption Omitted in Printing]

STATE OF OREGON                     )  
    ) ss.  
 COUNTY OF MULTNOMAH )

I, JOHN R. BENTLEY, being first duly sworn, depose and say:

That I am the Secretary-Treasurer of R. A. Gray & Co. I make this Affidavit in support of the Motion of R. A. Gray & Co. for a Temporary Restraining Order and/or Preliminary Injunction.

R. A. Gray & Co. is an Oregon corporation. It is engaged in business as a building and construction contractor. It has been engaged in this activity since 1964.

[2] In 1964 [sic] R. A. Gray & Co. entered into a Collective Bargaining Agreement with the Oregon State Council and Southwest Washington District Council of the United Brotherhood of Carpenters and Joiners of America, and their constituent local unions (herein "Union"), which are attached hereto, marked Exhibit 1.

On February 14, 1980, notice of termination was given. A copy of said notice is attached hereto, marked Exhibit 2. The Collective Bargaining Agreement terminated on May 31, 1980. No new Agreement has been executed between the parties.

Commencing Monday morning, July 2, 1980, the Union picketed projects of R. A. Gray. The picket signs stated that the Union was "on strike" against R. A. Gray. Since that time, the Union has sporadically picketed projects of R. A. Gray & Co. The picket sign states that R. A. Gray has no contract with the Union.

Approximately 63% of the Carpenters working for R. A. Gray prior to the commencement of the strike are now working for it. Approximately 37% have left the employ of R. A. Gray. I am advised that the majority of these have found work with other employers who contribute to the Oregon-Washington Carpenters Employers Pension Trust Fund.

R. A. Gray & Co. has a Pension Plan and a Profit Sharing Plan, copies of which are attached, marked as Exhibits 3 and 4 respectively. The Profit Sharing Plan applies to all employees. It preexisted the commencement of the labor dispute with the Union. The Pension Plan was established thereafter and applies to all employees unless they are covered under a Collective Bargaining Agreement. It [3] therefore applies to each employee performing work falling within the jurisdictional claims of the Union.

As a general contractor, it is necessary for R. A. Gray to analyze each of its costs in anticipation of bidding upon a project. Some of its more significant costs are those which relate to labor. In bidding R. A. Gray necessarily factored into its bidding considerations the contractually defined cost of its pension contributions. It did not, and it could not factor in, withdrawal liability since none existed prior to September, 1980.

Had such liability been known to exist, R. A. Gray would have considered the following alternatives:

1. Negotiate a collective bargaining agreement with the Union which involved a single employer as opposed to a multiemployer pension plan;

2. Termination of its Collective Bargaining Agreement; or

3. Include in its bids a cost factor against withdrawal liability.

Attached, marked Exhibits 5 and 6, are the demand and notice of default letters sent by the Oregon-Washington Carpenters Employees [sic] Trust Fund. Under the terms of these letters, unless a payment is made by November 22, 1981, R. A. Gray will be declared in default and the sum of \$201,359.00 will become immediately payable, together with interest, liquidated damages and attorney's fees for failure to pay.

Since 1965 the total contributions of R. A. Gray on behalf of employees performing work falling within the jurisdiction of the Union is \$398,095.00, \$237,000.00 of which was paid in the five years [4] immediately preceding.



If R. A. Gray is required to pay the sums set forth in the demand and notice of intent, the following consequences could well result:

1. R. A. Gray would be deprived of profitability in the next two years and therefore employees would not receive a share of profit under the terms of the Profit Sharing Plan.

2. R.A. Gray's balance sheet would be adjusted by \$200,000.00 with the attendant and necessary impact that such adjustment may have on its bonding capacity and ability to bid projects which require bonds.

3. Place cash flow of R. A. Gray & Co. in a condition which requires borrowing at interest rates between 18% and 20% annually.

3. [sic] Plans for expansion of business would have to be modified or shelved.

5. Contractors without withdrawal liability would be placed in a favored position for future bidding.

In consequence of the above, I believe that R. A. Gray and its employees would be irreparably harmed if required to pay as set forth in the demand and notice of intent.

Finally, I am attaching a letter furnished to me pertaining to an employer facing a similar plight, marked Exhibit 7.

/s/ \_\_\_\_\_

SUBSCRIBED AND SWORN TO BEFORE ME THIS 22ND DAY OF OCTOBER, 1981.

/s/ \_\_\_\_\_

NOTARY PUBLIC FOR OREGON  
MY COMMISSION EXPIRES: 3/14/84

[5] [EXHIBIT ONE TO AFFIDAVIT OF  
JOHN R. BENTLEY]

**CARPENTERS' SHORT FORM AGREEMENT  
OREGON AND SOUTHWEST WASHINGTON**

THIS AGREEMENT, Made and Entered Into this 23 day of July, 1968 by and between R. A. Gray & Co. (hereinafter called the EMPLOYER) and Oregon State Council of Carpenters, Portland and Vicinity District Council, S.W. Washington District Council, Piledrivers and Millwrights of the United Brotherhood of Carpenters and Joiners of America (hereinafter called the UNION), shall be in full force and effect from the date herein above set forth to and including May 31, 1971, and shall be automatically renewed from year to year thereafter unless either party shall give at least sixty (60) days written notice to the other party prior to May 31, 1971 or any subsequent May 31st.

The terms, conditions and coverage of the Carpenters' Labor Agreement, including any subsequent modifications are hereby adopted and made a part hereof by reference as though fully herein set forth between the Union and the Employer Association dated April 30, 1965, and subsequently amended and effective May 1, 1968.

The Employer shall report and shall make the Health & Welfare, Pension, Apprenticeship and Vacation contributions provided in said carpenters' Labor Agreement. The Employer further approves and adopts the agreements and declarations of trusts currently in force between the Union and the aforesaid Employer Associations, and further designates the trustees appointed by the aforesaid Employer Associations as his representatives in the administration of said trust funds.

**UNION:**

**OREGON STATE COUNCIL  
OF CARPENTERS**

By \_\_\_\_\_/s/

Executive Secretary

\_\_\_\_\_/s/

Authorized Signature

**EMPLOYER:**

**R. A. Gray & Co.** \_\_\_\_\_

Address P.O. Box 23567 \_\_\_\_\_

Town: Tigard, Oregon \_\_\_\_\_

Telephone No. 639-6127 \_\_\_\_\_

(Receipt of copy  
acknowledged)

/s/ \_\_\_\_\_

Authorized Signature

● ● ●

[7] CARPENTERS  
MASTER  
LABOR AGREEMENT

THIS AGREEMENT, made and entered into this first day of June, 1973, and as amended 6/1/75 for the period 6/1/75-5/31/80.

BETWEEN

**OREGON-COLUMBIA CHAPTER,  
THE ASSOCIATED GENERAL CONTRACTORS  
OF AMERICA, INC.**

AND

OREGON STATE COUNCIL  
SOUTHWEST WASHINGTON DISTRICT COUNCIL

OF THE

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA

[UNION SEAL OMITTED IN PRINTING]

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**[13] ARTICLE XV**  
**PENSION**

Section 1. In addition to the wage scales listed in Schedules "A" herein, all persons, parties, firms or corporations as listed in Schedule "B," or otherwise coming under the scope of this Agreement, who are, or may become signatory parties to this Agreement, agree that the existing Pension Trust Fund as established July 1, 1962, shall continue in full force and effect for the purpose of providing Pension benefits for all eligible employees covered by this Agreement, and shall pay into the existing Oregon-Washington Carpenters-Employers Pension Trust Fund the sum of forty cents (40¢) per compensable man-hour effective June 1, 1973, and the sum of sixty-five cents (65¢) per compensable man-hour effective June 1, 1974. Such payments shall be made monthly in accordance with the requirements of the Trust Agreement and all applicable provisions of the existing Trust Agreement shall continue in full force and ef-

fect. The fund established by prior contributions shall be recognized as a fund held in trust, and therefore an appropriate depository [sic] for the contributions referred to herein above.

Section 2. It shall be a violation of this Agreement for the Union to allow workmen covered by this Agreement to work for an employer who fails, after due notice, to make the proper contributions to the Pension Fund in accordance with the provisions of this Agreement.

Section 3. In the event an employer fails to make the monetary contributions in conformity with this Article of the Agreement, the Union is free to take any economic action against such employer it deems necessary, and such action shall not be considered a violation of this Agreement.

\* \* \*

[20] [EXHIBIT TWO TO AFFIDAVIT OF  
JOHN R. BENTLEY]

February 14, 1980

Oregon State Council of Carpenters  
United Brotherhood of Carpenters & Joiners of America  
411 N.E. 12th Avenue, Room 105  
Portland, Oregon 97232

Gentlemen:

Pursuant to Article III, Section 2 of the collective bargaining agreement, R.A. Gray & Co. exercises its right to terminate the collective bargaining agreement with the Oregon State Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, and/or its affiliated locals.

Yours truly,

J.R. Bentley /s/  
Secretary-Treasurer

CC: Federal Mediation & Conciliation Service  
Employment Relations Board, Conciliation Service  
Division  
Mr. Thomas M. Triplett; Schwabe, Williamson, Wyatt,  
Moore & Roberts  
District Council of Carpenters, Portland, OR

[CERTIFIED MAIL RECEIPTS OMITTED IN PRINTING]

[34]

## [EXHIBIT SIX TO AFFIDAVIT OF JOHN R. BENTLEY]

OREGON-WASHINGTON CARPENTERS-EMPLOYERS  
TRUST FUNDSFund Manager • Trust Group, U.S. National Bank of Oregon  
309 S.W. Sixth Avenue, P.O. Box 3168, Portland, Oregon 97208 • Phone 225-5675

September 25, 1981

R.A. Gray & Co.  
P.O. Box 23516  
Tigard, Oregon 97223Subject: Delinquent Withdrawal Liability  
Payment

Dear Sirs:

Your quarterly withdrawal liability payment due within 60 days of the July 24, 1981, demand has not been received and is *delinquent*.

Interest accrues on your delinquent payment based on prevailing market rates for comparable obligations in accordance with Pension Benefit Guaranty Corporation regulations which have not yet been issued. Absent contrary regulations, interest accrues on your delinquent payment in the amount of \$8.74 a day from the initial due date through the date the delinquent withdrawal liability payment and accumulated interest is received by the Trust Office.

If that quarterly payment, together with interest, is not received within 60 days after your receipt of this letter, your withdrawal liability payment will be in default. In the event of a default, the Board of Trustees hereby demands immediate payment of the entire balance of your withdrawal liability, \$201,359, plus interest on that amount from the due date of the first quarterly payment that was not timely made.

Yours very truly,  
Dolores H. Taylorcc: Co-Legal Counsel  
Mr. Thomas M. Triplett  
Certified Mail # 124483

**STATEMENT OF REASONS AND AUTHORITIES OF  
DEFENDANT PENSION BENEFIT GUARANTY  
CORPORATION IN OPPOSITION TO PLAINTIFF R.A.  
GRAY & CO.'S MOTIONS FOR TEMPORARY  
RESTRAINING ORDER, PRELIMINARY INJUNCTION,  
ORDER THAT NOTICE OF LIABILITY BE WITHDRAWN  
AND ORDER THAT NOTICE OF DELINQUENCY BE  
NULLIFIED**

[CAPTION OMITTED IN PRINTING]

**Preliminary Statement**

Defendant, Pension Benefit Guaranty Corporation (the "PBGC"), is a wholly-owned United States Government corporation created by Section 4002(a) of the Employee Retirement Income Security Act of 1974 ("ERISA"), *as amended by* the Multiemployer Pension Plan Amendments Act of 1980 ("Multiemployer Act"), Pub. L. No. 96-364, 94 Stat. 1208 (1980), 29 U.S.C.A. §1302(a) (Supp. 1981). The PBGC was created to administer the pension plan termination insurance program established by Title IV of ERISA, 29 U.S.C. §§1301-1382 (1976). The PBGC shares the responsibility for enforcing the mandatory multiemployer pension plan withdrawal [2] liability and insolvency insurance program added by the 1980 amendments to Title IV of ERISA, 29 U.S.C.A. §§1301-1461, 1303(a), 1303(e)(1) (Supp. 1981).<sup>1</sup>

Plaintiff R.A. Gray & Co. ("Gray") is an Oregon corporation which has entered into successive collective bargaining agreements with the Oregon State Council of Carpenters (affiliated with United Brotherhood of Carpenters & Joiners of America) (the "Union").

Defendant Oregon-Washington Carpenters-Employers Trust Fund (the "Trust") is a trust organized under the laws of the United States and the state of Oregon. The Trust is administered pursuant to the Revised Pension Plan

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<sup>1</sup> The factual averments which follow are based upon the complaint and its supporting documents. For purposes of this pleading, the PBGC will accept the recited facts as true, reserving the right at subsequent stages of this case to conduct discovery and develop a complete record with regard to these and other factual allegations.



for the Oregon-Washington Carpenters-Employers Pension Trust Fund (the "Plan"), which is a multiemployer defined benefit pension plan within the meaning of Section 4001(a)(3) of ERISA, 29 U.S.C.A. §1301(a)(3) (Supp. 1981). The trustees of the Trust are the plan sponsor of the Plan within the meaning of Section 4001(a)(10) of ERISA, 29 U.S.C.A. §1301(a)(10) (Supp. 1981). Gray made contributions to the Trust in accordance with Gray's collective bargaining agreements with the Union.

On or about February 14, 1980, Gray notified the Union that, effective June 1, 1980, Gray was terminating its collective bargaining agreement with the Union. On or about June 1, 1980, the Union began a strike against Gray, which allegedly continues to the present.

On or about July 24, 1981, the trustees of the Trust notified Gray, pursuant to Sections 4202(2), and 4219(b)(1)(A) of ERISA, 29 U.S.C.A. §§1382(2), 1399(b)(1)(A) (Supp. 1981), [3] that Gray was liable to the Plan, pursuant to Section 4201 of ERISA, 29 U.S.C.A. §1381 (Supp. 1981), and demanded payment of a withdrawal liability of \$201,359. Exhibit 1. The notice of liability stated that Gray ceased to have an obligation to contribute to the Trust on or about June 1, 1980, and consequently withdrew from the Plan in a complete withdrawal as defined in Section 4203 of ERISA, 29 U.S.C.A. §1383. In a letter to the Plan administrator dated August 6, 1981, Gray's counsel raised several questions regarding Plan rules and amendments adopted pursuant to the Multi-employer Act, and requested copies of actuarial reports and other information needed to permit Gray to compute its withdrawal liability. Exhibit 2. Some of the questions were prompted by the fact that a new single-employer pension plan covering Gray's employees had been or would soon be established as a substitute for the Plan. By letter dated September 3, 1981, counsel for the Trust supplied some of the documents and information requested, and made the actuarial reports available for inspection. Exhibit 3. Gray's counsel replied in a letter dated September 10, 1981, inviting the Trust to "declare a moratorium on enforcement," or alternatively to join Gray in suing the PBGC, asserting the



Multiemployer Act is unconstitutional. Exhibit 4. In a letter dated September 16, 1981, the Trust's counsel declined the invitation to join with Gray in contesting the Multiemployer Act, stated they would not recommend a "moratorium" on the collection of Gray's liability, and provided copies of the actuarial valuations of the Trust. Exhibit 5.

Subsequently, in a letter dated September 25, 1981, the Plan Administrator notified Gray of the delinquency of its quarterly payment of withdrawal liability, and that Gray would be in default if it did not cure its failure to pay within 60 days. Exhibit 6.

[4] On September 29, 1981, Gray filed its complaint and its Application of Plaintiff for Preliminary Injunction and for Order to Show Cause. On October 6, 1981, Gray filed its Motion of Plaintiff for Expedited Hearing and/or Application of Plaintiff for Temporary Restraining Order. On October 7, 1981, this court set a hearing for October 16, 1981, on both the Motion for a Temporary Restraining Order and the Motion for a Preliminary Injunction. The hearing date was later changed to November 4, 1981, then reset for November 16, 1981, in order to hear the Plan's motion for summary judgment (filed October 23 and which, as of this filing, has not been received by the PBGC) as well as Gray's motion for preliminary injunction. In a minute order, the court requested counsel to advise the court whether the hearing could be consolidated with the trial on the merits. In a letter to the court, the PBGC has respectfully requested that the court not consolidate the trial on the merits with the hearing on the preliminary injunction.

In the complaint, Gray denied that it has withdrawn from the Plan and alleged that the Multiemployer Act is unconstitutional. The PBGC denies all of the allegations of irreparable injury and unconstitutionality pleaded in Gray's complaint. In addition, as discussed *infra*, the PBGC believes that further facts must be developed to determine whether plaintiff has withdrawn from the Plan—an issue properly left for arbitration under the Multiemployer Act. Accordingly, pursuant to Rule 11(b) of the Local Rules of the

United States District Court for the District of Oregon, the PBGC opposes Gray's motions for equitable relief pending a trial of the merits, and files this Statement of Reasons and Authorities in support of its opposition.

\* \* \*

[21] [EXHIBIT TWO TO STATEMENT OF REASONS  
AND AUTHORITIES OF PBGC]

SCHWABE, WILLIAMSON, WYATT, MOORE & ROBERTS  
ATTORNEYS AT LAW  
1200 STANDARD PLAZA  
1100 S.W. 6TH AVENUE  
PORTLAND, OREGON 97204  
TELEPHONE (503) 222-9981

[PORTION OF LETTERHEAD OMITTED IN PRINTING]

August 6, 1981

Ms. Dolores H. Taylor  
Oregon-Washington Carpenters-  
Employers Trust Funds  
Administrator  
U.S. National Bank of Oregon  
P.O. Box 3168  
Portland, Oregon 97208

Re: R.A. Gray & Co.

Dear Ms. Taylor:

Your letter of July 24, 1981, directed to R.A. Gray, has been referred to the undersigned for response. The contents of your letter raised a number of serious questions to which response is requested. The questions include the following:

1. Section 4218 of Public Law 96-364 provides that withdrawal does not occur when

"\* \* \* an employer suspends contributions under the Plan during a labor dispute involving its employees."

Commencing on June 1, the Oregon State Council of Carpenters and its constituent locals struck R.A. Gray. They have picketed intermittently since that time. I would appreciate being advised as to what information the Trust had when it concluded that the "labor dispute" has terminated and therefore that Section 4218 (2) is no longer operative.

2. It is apparent that the Trust has adopted a series of amendments pursuant to the provisions of Public Law

96-364. We would request copies of those amendments together with the current provisions of the Plan.

[22] 3. We would request copies of the last three actuarial reports to the Trust.

4. We would request that the Plan sponsor, pursuant to Section 4221 (e), furnish general information necessary from which R.A. Gray can compute its withdrawal liability. We would interpret this request to encompass furnishing complete information with respect to determination of the total withdrawal liability of the Plan as of June 30, 1979.

5. We would request information pertaining to the rules that the Plan has adopted with respect to transfer from a multiemployer plan to a single employer plan. It may well be that a request will be made for transfer of assets and/or liabilities.

6. We would request information from the actuary to determine what safeguards or steps have been taken to assure that the total fund of withdrawal liability does not include ineligible employees, i.e., supervisors or other exempt personnel, so as to inappropriately increase the amount of unfunded withdrawal liability.

Finally, we would request that you furnish this information promptly. As you have correctly pointed out, the time within which a request for review can be made is brief and therefore your prompt response is absolutely mandatory. Your prompt reply would be greatly appreciated.

Very truly yours

THOMAS M. TRIPLETT

TMT/baw

cc: Mr. John Bentley  
R.A. Gray & Co.

SCHWABE, WILLIAMSON, WYATT, MOORE & ROBERTS

[23] [EXHIBIT THREE TO STATEMENT OF REASONS  
AND AUTHORITIES OF PBCG]

OREGON-WASHINGTON CARPENTERS-EMPLOYERS  
TRUST FUNDS

[PORTION OF LETTERHEAD OMITTED IN PRINTING]

RECEIVED  
SEP 5 1981  
MILLER, NASH, YERKE,  
WIENER & HAGER

September 3, 1981

Mr. Thomas M. Triplett  
Attorney at Law  
1100 S.W. Sixth Avenue  
Portland, Oregon 97204

Subject: Oregon-Washington Carpenters-Employers  
Pension Trust Fund

R.A. Gray & Co.

Dear Mr. Triplett:

We are co-legal counsel for the subject Trust Fund. Your August 6, 1981, letter to the Fund Manager regarding R.A. Gray & Co. ("Gray") was referred to us for a response. The Trust Fund's response to the six matters referred to in your letter is set forth below.

*Labor Dispute.* When the Board of Trustees had the July 24, 1981, letter sent to Gray, no assertion had been made to the Board that Gray's termination of its collective bargaining agreement was because of a "labor dispute" within the meaning of Section 4218 of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). In any event, that section provides that:

"An employer shall not be considered to have withdrawn from a plan *solely because* — \* \* \* an employer suspends contribution under the plan during a labor dispute involving its employees." (Emphasis added)

Even if a "labor dispute" exists with respect to Gray, its cessation of contributions resulted from cessation of its labor agreement obligation to contribute. That cessation has continued for some 15 months and appears to constitute

[24] something more than a "suspension of contributions" under ERISA Section 4218(2). Even if a "suspension of contributions" exists, it is doubtful that Gray's withdrawal was "solely because" of a "labor dispute" as those terms are used in that section. For your information, section 4218 as referenced in your letter is not a section of Public Law 96-364, the Multiemployer Pension Plan Amendments Act of 1980 ("Multiemployer Act"), but is a section of ERISA, Public Law 93-406, added by the Multiemployer Act.

*Plan Amendments.* We enclose a copy of the Trust Pension Plan Sixth Amendment which includes the Multiemployer Act changes.

*Actuarial Valuations.* You requested copies of the last three Trust Fund actuarial reports. Presumably, you mean the last three actuarial valuations. Those valuations and the copying charge (\$.10 per page) for each is as follows:

Actuarial valuation	
as of June 30, 1978	\$4.00
Actuarial valuation	
as of June 30, 1979	\$4.00
Actuarial valuation	
as of June 30, 1980	\$4.90

You may review those valuations at no charge by arranging a mutually convenient time with the Fund Manager.

*Plan Unfunded Vested Benefits.* You requested general information pursuant to ERISA Section 4221(e) from which Gray can compute its withdrawal liability. By July 24, 1981, demand letter to Gray, the Trust Fund provided Gray with the completed statutory formula used to compute its withdrawal liability. Martin E. Segal Company is the Trust Fund consultant and actuary. Segal has made the actuarial determinations involved and your letter was forwarded to them for review and comment. Their letter of August 26, 1981, is enclosed herewith.

*Asset Transfer Rules.* To date, the Trust Fund has not adopted any rules pursuant to ERISA Section 4234(a) regarding the transfer of assets from the Plan in connection with the transfer of Plan liabilities to a single-employer plan. No requests for any such transfer have been made to

date. Any such transfer must comply with ERISA Section 4232.

[25] *Ineligible Employees.* You requested information regarding the safeguards or steps that have been taken to assure that June 30, 1979, unfunded vested benefits do not include ineligible employees such as supervisors or other exempt personnel.

Section 1.06 of the Revised Pension Plan defines an "Employee" as excluding "any self-employed person, whether a sole proprietor or a partner." Similar language is included in the Plan summary plan description at page 20. "Employee" is defined at that section as an employee performing one or more hours of work of the type covered by the collective bargaining agreement, employee members of union or local unions and certain supervisory employees pursuant to regulations adopted by the Trustees.

Employer contributions and Trust benefits are based on covered hours of service reported on the monthly employer remittance report. Instruction No. 6 of the report provides that, "Contributions from self-employed carpenters cannot be accepted." During June, 1980, all employers were again advised that "owner-operators" are not eligible to participate in the Pension Trust Fund as they do not qualify as an "employee."

Trust Fund remittance reports are reviewed by Fund Manager personnel to determine whether contributions are being made on other than employees as a function of the name of the business entity and the individuals being reported on.

Very truly yours,

/s/ \_\_\_\_\_  
John W. Hill

/s/ \_\_\_\_\_  
Paul T. Bailey  
Co-Legal Counsel

bcc: Joint Executive Committee  
United States National Bank of Oregon,  
Ms. Dolores H. Taylor



RECEIVED  
AUG 28 1981  
MILLER, NASH, YERKE,  
WIENER & HAGER

[26]

**MARTIN E. SEGAL COMPANY**

57 POST STREET • SAN FRANCISCO, CALIFORNIA 94104 • (415) 392-0930

August 26, 1981

**[PORTION OF LETTERHEAD OMITTED IN PRINTING]**

Donald A. Burns, Esq.  
900 S.W. Fifth Avenue  
Portland, Oregon 97204

Re: Oregon-Washington Carpenters-Employers  
Pension Trust Fund—R.A. Gray & Co.  
Withdrawal Liability

Dear Don:

As discussed in our telephone conversation of yesterday the following describes the actuarial method used to determine the Fund's total withdrawal liability as of June 30, 1979.

First on the basis of the actuarial assumptions utilized in the periodic annual actuarial valuations of the Fund the present value of all of the Fund's vested benefits are calculated.

A second calculation of the present value of vested benefits is made based on the Fund's ongoing actuarial assumptions except that the interest rates promulgated by PBGC for single employer terminations are used. (The PBGC interest rate assumptions vary from 7.50% down to 4.00% depending upon the time left to retirement.)

The Funds assets as of June 30, 1979 on a market value basis are divided by the present value of vested benefits as determined by the second calculation above. The reciprocal of this factor is then applied to the present value amount determined by the first calculation described above and the result is the net total withdrawal liability as of June 30, 1979 for all employers.



In performing these calculations we relied on the contribution data and individual participant records as supplied by the Fund Office and made no explicit allowance for administration expenses. Also amendments effective after June 30, 1979 were not included.

Please advise if you have any questions.

Sincerely,

James P. Lowe

tjr

cc: Paul T. Bailey, Esq.

[29] [EXHIBIT FIVE TO STATEMENT OF REASONS  
AND AUTHORITIES OF PBGC]  
OREGON-WASHINGTON CARPENTERS-EMPLOYERS  
TRUST FUNDS  
[PORTION OF LETTERHEAD OMITTED IN PRINTING]

RECEIVED  
SEP 17 1981  
MILLER, NASH, YERKE,  
WIENER & HAGER  
September 16, 1981

Mr. Thomas M. Triplett  
Attorney at Law  
1200 Standard Plaza  
1100 S.W. Sixth Avenue  
Portland, Oregon 97204

Subject: Oregon-Washington Carpenters-Employers  
Pension Trust Fund  
Multiemployer Pension Plan Amendments  
Act of 1980—R.A. Gray & Co.

Dear Mr. Triplett:

We are in receipt of your September 10, 1981, letter.

*Requested Documents.* We enclose a copy of the Pension Trust Fund actuarial valuations as of June 30, 1978, June 30, 1979, and June 30, 1980. We also enclose the August 26, 1981, letter from Martin E. Segal Company referred to in our September 3, 1981, letter.

*Supervisory Employees.* You indicate in your letter that your primary concern with respect to ineligible employees relates to work by supervisory employees. As indicated in our September 3, 1981, letter, the term employee is defined at Pension Plan Article I, Section 1.06, to include certain supervisory employees as follows:

"\* \* \* The term 'Employee' also means an employee employed by an Individual Employer in a *supervisory capacity* who had earned Credited Service under this Pension Plan at any time prior to his employment in a supervisory capacity, pursuant to regulations adopted by the Trustees." (Emphasis added)

Supervisory employees are permitted to continue their Plan participation if their employer enters into a special [30] agreement with the Trust Fund to provide for their coverage. Absent such agreed upon coverage, supervisory employees cannot continue Pension Plan participation.

As recently as April, 1980, all contributing employers were notified that supervisory employees were ineligible to participate absent a special agreement. Similarly, all new contributing employers are also notified of that requirement.

We are advised that the Fund Manager regularly reviews employer remittance reports to determine whether an employer may be contributing on a salaried supervisory employee who has not been covered by a special agreement. On a random basis, a number of an employer's monthly reports are compared. A flat number of hours contributed with respect to an employee over a period of time usually indicates salaried rather than hourly employment.

*Multiemployer Act Litigation.* As there is no meeting of the Board of Trustees Joint Executive Committee scheduled prior to the initial payment date for R.A. Gray & Co.'s first withdrawal liability payment, we are unable to advise you of the position of the Board of Trustees regarding the pending litigation concerning the constitutionality of the Multiemployer Pension Plan Amendments Act of 1980 ("Multiemployer Act"). It is our understanding that the status of the pending Illinois litigation is merely that the Federal District Court may properly hear the questions raised in the complaint. There has been no ruling by any court on the constitutionality of the Multiemployer Act. Until such time as the United States District Court for the District of Oregon rules on the questions involved or until the United States Supreme Court decides those questions, we would not recommend and it is unlikely that the Board of Trustees would seriously consider a moratorium on the collection of withdrawal liability payments as required by the Multiemployer Act. In addition, it is doubtful whether the Trust Fund would consider joining with R.A. Gray & Co. in litigation similar to the Illinois litigation.

Yours very truly,

/s/ \_\_\_\_\_  
Donald A. Burns

/s/ \_\_\_\_\_  
Paul T. Bailey  
Co-Legal Counsel

[32] [EXHIBIT SIX TO STATEMENT OF REASONS  
AND AUTHORITIES OF PBGC]

OREGON-WASHINGTON CARPENTERS-EMPLOYERS  
TRUST FUNDS

[PORTION OF LETTERHEAD OMITTED IN PRINTING]

RECEIVED  
SEP 26 1981  
MILLER, NASH, YERKE,  
WIENER & HAGER

September 25, 1981

R.A. Gray & Co.  
P.O. Box 23516  
Tigard, Oregon 97223

Subject: Delinquent Withdrawal Liability  
Payment

Dear Sirs:

Your quarterly withdrawal liability payment due within 60 days of the July 24, 1981, demand has not been received and is *delinquent*.

Interest accrues on your delinquent payment based on prevailing market rates for comparable obligations in accordance with Pension Benefit Guaranty Corporation regulations which have not yet been issued. Absent contrary regulations, interest accrues on your delinquent payment in the amount of \$8.74 a day from the initial due date through the date the delinquent withdrawal liability payment and accumulated interest is received by the Trust Office.

If that quarterly payment, together with interest, is not received within 60 days after your receipt of this letter, your withdrawal liability payment will be in default. In the event of a default, the Board of Trustees hereby demands immediate payment of the entire balance of your withdrawal liability, \$201,359, plus interest on that amount from the due date of the first quarterly payment that was not timely made.

Yours very truly

/s/

\_\_\_\_\_  
Dolores H. Taylor

cc: Co-Legal Counsel  
Mr. Thomas M. Triplett  
Certified Mail # 124483

[33] [EXHIBIT SEVEN TO STATEMENT OF REASONS  
AND AUTHORITIES OF PBGC]

SCHWABE, WILLIAMSON, WYATT, MOORE & ROBERTS  
ATTORNEYS AT LAW  
1200 STANDARD PLAZA  
1100 S.W. 6TH AVENUE  
PORTLAND, OREGON 97204  
TELEPHONE 503-222-9981

RECEIVED  
OCT 14 1981  
MILLER, NASH, YERKE,  
WIENER & HAGER

[PORTION OF LETTERHEAD OMITTED IN PRINTING]

October 12, 1981

Oregon-Washington Carpenters-  
Employers Trust Fund  
306 SW Sixth Avenue  
P.O. Box 3168  
Portland, Oregon 97208

RE: *R.A. Gray & Co.*

Gentlemen:

R.A. Gray & Co. is in receipt of the notice notifying it of an assessment of withdrawal liability. It protests the assessment and requests review by the plan sponsor as follows:

1. Whether there was and remains a labor dispute.
2. Whether it would be constitutionally permissible to assess withdrawal liability against R.A. Gray.
3. Whether the trustees satisfied their fiduciary responsibilities in electing the withdrawal liability formula chosen.
4. Whether the schedule of payments is appropriate.
5. Whether the actuarially determined unfunded vested benefits are accurate.
6. Whether portions of the actuarially determined unfunded vested benefits and/or liability relate to persons not otherwise qualified to participate in the plan.

[34] 7. Whether a transfer from the Plan to the R.A. Gray Plan would be appropriate.

8. Whether there was a permanent termination of an obligation to contribute and if so, when?

We would be happy, at an appropriate time within the 90 days set forth in Section 4219 (b) and (2) (A) to furnish such additional relevant information as you may require in order to assess our request for review. More specifically, we would be happy to make personnel of the Company available and also to have our actuary meet with yours for such purposes as are suggested to be prudent.

Very truly yours,

/s/

\_\_\_\_\_  
THOMAS M. TRIPLETT

TMT/baw

cc: Mr. John Bentley  
Mr. William B. Crow  
Mr. Paul T. Bailey  
Mr. Ron Hall

SCHWABE, WILLIAMSON, WYATT, MOORE & ROBERTS

**MOTION FOR SUMMARY JUDGMENT****[CAPTION OMITTED IN PRINTING]**

Plaintiff, R.A. Gray & Co., moves for summary judgment against defendants, and each of them, pursuant to the provisions of Rule 56, F.R.C.P., upon the ground and for the reason that there is no genuine issue as to any material fact and that the plaintiff is entitled to a judgment as a matter of law.

SCHWABE, WILLIAMSON, WYATT,  
MOORE & ROBERTS

By: /s/ Thomas M. Triplett

---

Thomas M. Triplett  
Attorneys for Plaintiff

[2] Plaintiff will rely upon its briefs previously filed in connection with its Motion for interim relief, together with the brief (to be filed pursuant to Court Order on November 10, 1981) in opposition to defendant Oregon-Washington Carpenters-Employers Pension Trust Fund's Motion for Summary Judgment.



## TRANSCRIPT OF PROCEEDINGS

November 16, 1981

Portland, Oregon

[CAPTION OMITTED IN PRINTING]

*Before*

The Honorable James A. Redden, United States District Court Judge.

*Appearances:*

Mr. Thomas M. Triplett and Ms. Mildred J. Carmack, Of Attorneys for Plaintiff;

Messrs. William B. Crow, Donald Burns and David Paul, Of Attorneys for Oregon-Washington Carpenters-Employers Pension Trust Fund;

Mr. Baruch Fellner, Of Attorneys for Pension Benefit Guaranty Corporation

[2] THE CLERK: This is Civil No. 81-912, R.A. Gray & Co. v. Oregon-Washington Carpenters-Employers Pension Trust Fund, et al. This is the hearing on preliminary injunction and cross motion for summary judgment

MR. CROW: Your Honor, William Crow, speaking on behalf of the trust fund. I'd like to introduce to the Court Mr. Baruch Fellner, who is a member of the District of Columbia Bar, as well as the Ninth Circuit Court of Appeals. He is here representing the Pension Benefit Guaranty Corporation.

THE COURT: All right. I have had an opportunity to review this matter in great detail and also your briefs and everything that has been filed in the matter. Let me make a statement at the outset which would be an indication the way I am going to rule and ask you to respond to it.

As you know, the case is here on plaintiff Gray's request for a preliminary injunction. Gray seeks to order defendant Trust to withdraw its notification of assessment against it, and to enjoin Trust's actions to collect or to declare Gray in default for failure to pay the alleged "withdrawal liability." They seek this preliminary injunction pending determination of the underlying action for declara-



tory judgment. [3] The claimed withdrawal liability exceeds \$200,000.

Those parties have also filed cross motions for summary judgment on the underlying declaratory judgment action. Those motions are also before the Court.

As to the preliminary injunction, Gray cannot prevail unless it demonstrates a combination of probable success and the possibility of irreparable injury, or that serious questions are raised and the balance of hardship tipped sharply in its favor. The bottom line in this case is irreparable harm.

I believe that the preliminary injunction should be denied because Gray cannot demonstrate irreparable harm.

Their options include:

1. Payment of the sum in quarterly payments or in full, and subsequent recovery of those sums if they prevail in this or any like action.

2. Submission to arbitration (which would seem necessary to determine if they have actually withdrawn, which they now deny.)

3. If they lose arbitration they can pay and then challenge and recover if the arbitrator was incorrect, or

4. They can simply refuse to pay and [4] assert their constitutional defenses in the lawsuit which will then be brought against them by the Trust.

I think Gray's approach to this matter is imaginative and counsel has demonstrated that, if not irreparable harm.

I firmly believe it would be inappropriate to rule on the motions for summary judgment. To rule would require ruling on constitutional questions at a time when such a ruling is not clearly necessary. It may be that arbitration will be dispositive and these questions need not be ruled upon for the benefit of these parties. The constitutional questions can be better answered in an action brought against Gray, by the Trust, for collection of the monies.

It seems to me that these proceedings should be stayed while Gray pursues arbitration or defends against the Trust's action for collection (which I assume will be filed).

I do not find that submitting to arbitration, or defending a lawsuit are irreparable harm.

Mr. Triplett.

MR. TRIPLETT: Your Honor, Tom Triplett. Let me first address the question of what it is that would be submitted to arbitration because I think that depends in what you just stated. [5] In the communications which we submitted to the Trust we suggested as issues for their review is as follows:

First, is the Multi-Employer Reform Act of 1980 constitutional? That really isn't an issue that the trustees are particularly well trained to cope with.

The second question is: Is there a labor dispute within the meaning of the 1980 Act. That hasn't been interpreted. It's a question of law. The facts set forth in the affidavit are very simple.

In February, notice of termination was given.

On June 1, the contract terminated. The carpenters commenced to picket on June 1 and have continued to picket. Those are the facts, clear and simple. No issue as to whether those are the facts. Those are the facts, not contested.

What is the issue that arises? Was there a labor dispute and does it continue, an issue of law which must be determined ultimately by a Court.

The next question: Was there a "permanent" cessation of the relationship between the parties in order to trigger withdrawal liability?

Well, what does the word "permanent" mean? That's the word in the statute. We asked the [6] trustees to review and would request ultimately the arbitrator to determine what the word "permanent" means as employed within the meaning of the statute. That's a legal issue, pure and simple.

We would contend, for example that the word "permanent" destroys the entire statutory frame of reference. How do you know something is permanent? What did Congress intend by the use of the word "permanent"? Does it mean if 17 years from today if R.A. Gray's employees elected to be represented again by the carpenters, that that wasn't a permanent cessation and the money should be paid

back? Issue therefore, question of law. What does the word "permanent" mean as used in the statute.

The next question that we asked, "Please tell us what the actuary assumptions are so that we know whether a \$200,000 or \$250,000 is the correct number, not the question of whether liability, but simply the question how bad is the amount of liability we are talking about. This doesn't affect the question of whether there were withdrawal liabilities, but simply the sum of it.

Then we also inquired whether they had people within the plan, such as supervisors and others on whose behalf contributions were made who are [7] disqualified by the terms of the plan, but because of the disproportionate number of them there may be an enhanced amount of withdrawal liability. Again, not a question of whether there is liability, but whether the liability which is set at \$200,000 is the correct sum.

But, as I say, not whether there was liability.

In conclusion, what we have asked is for the trustees and ultimately for the arbitrator to determine questions of law. Any question of fact only goes to the question of how much, not whether. Any question of consequences, we don't believe it appropriate to go to that hearing and to the expense of it.

One of the issues which is raised by Your Honor's suggestion, we urged that the entire collection scheme of the statute is unconstitutional in that it deprives R.A. Gray of a right to a jury. The scheme of the statute states that the trustees will make a determination of the amount of underlying liability. It provides then that we have the right to object and ask for a review.

Now, what is the standard for review that is set forth in the statute? It doesn't say anything except that the determination of the plan-sponsors shall [8] be given by the arbitrator credence unless it is overshadowed that the determination was clearly erroneous or unreasonable.

So the first bar of review, which is under 4211(a)(3) the plan sponsor, Union trustees and Employer trustees, take the first cut and their decision will not be overruled by the arbitrator unless unreasonable or clearly erroneous.

Consider that scheme of things when you look to who the plaintiff is. The plaintiff is now a non-union contractor. Do we really believe that the union trustees can give that non-union contractor a fair day in Court in their review? And, who are the other trustees? Employer trustees who are union contractors who would love to have a leg up on R.A. Gray. Again, a clear motive, not to issue dispassionate justice. So we have two interested parties, union trustees, management trustees, who are going to decide whether R.A. Gray has legal defenses; and, their determination is to be given tremendous weight by the arbitrator.

Now, that, in effect, type of kangaroo session contemplated by this Act are in and of themselves unconstitutional on due process grounds and on the Seventh Amendment ground. We then carry it one step further. [9] The arbitrator, locked in as he is, with this standard to review what the trustees have decided, he then enters an opinion which apparently the Court, upon review, cannot challenge unless it finds by the clear preponderance of evidence that the arbitrator has erred; so, we have a two level review process within internal standards of review that literally makes it impossible to claim that R.A. Gray would receive due process.

Now the Court opined, "Well, even after this double review process is completed, we could come back to this Court; and, if they were wrong, get the interim payments back." There is absolutely not one word in the statute that says that we are entitled to get any payment that we made back.

In urging the point, the Government cites some legislative history. That's all it cites for support that we can get our money back. This Court is probably familiar with the fact that under ERISA, there was a very obscured statute that says, "You're entitled to a refund for up to one year." So people who had been making contributions for five or six years erroneously, got one year back. We argued what the meaning of the one year was. We said it didn't mean what it said. It never was ultimately resolved; and finally in the Pension Reform Act of 1980, it was changed. [10] But the fact of the matter is, this creature of a statute that says:

"We impose liability," has no provision that says, "If you pay erroneously, you get it back."

Now, I submit that is irreparable harm if we aren't entitled to get the money back there are other things about injury which I think needs to be considered?

THE COURT: What if you just refused to pay, you get sued and then you have the opportunity to set forth your constitutional defense in a straight out lawsuit.

MR. TRIPLETT: Well, as you know, acceleration is permitted under the statute. With acceleration, that means instead of \$16,000, \$207,000 are owing now.

THE COURT: I'm aware of that. You haven't paid it. You can refuse to pay.

MR. TRIPLETT: Yes, we can refuse to pay; but then it becomes \$207,000 on the 23rd of November. And, instead of three years of 16's, I submit that's a significant difference. Then, what do we do with our balance sheet? You have got to remember this is a contractor, general contractor. What do they do? What is their lifestyle? They bid on projects. They have got to know what their costs are in order to make proper [11] bids. If they don't know what their costs are, then they are in jeopardy of having catastrophic losses on project by project. And if they are successful in a bid, they have to have a bond.

\* \* \*

[19] THE COURT: I will be interested in the argument that Mr. Triplett has made that there is no guarantee if he pays this money and he turns out to be right that he would get the money back either in the statute or in any agreement made or that could be made.

MR. CROW: I can respond to that, Your Honor. That is one of the elements of irreparable harm that Mr. Triplett has suggested. Although there is no provision in the statute expressly giving an employer who has made erroneous contributions the right to recover that contribution, we are satisfied—the Trust is satisfied that he does have that right—the employer does have that right. We are prepared to agree today here in Court that if the contribution is made and it is ultimately decided that this withdrawing em-



ployer wasn't obligated to make it, he will be entitled to receive the contribution back.

**THE COURT:** Is there anything in the statute that anybody is aware of that would prohibit that type [20] of agreement?

**MR. CROW:** We can find nothing that would prohibit it, Your Honor. Indeed, we think legally there should be no question and the Court could require that repayment be made.

If I may just respond to some of Mr. Triplett's arguments and the reason we think there is no irreparable harm and why no preliminary injunction should be issued, in addition to the fact we certainly concur that if payment is made erroneously, it should be repaid. We agree to do that. If there is any question about the obligation or the right of the Trust to make such an agreement, we will take the next step and suggest to the Court that if the payments are to be made, they could be made to an escrow account and paid over to the party who prevails ultimately so that party will not have lost the use of those funds.

The arguments that Mr. Triplett has made seems to me do not rise to the level of irreparable harm with respect to the standard of review by a jury and lack of a jury trial. Ultimately, Mr. Triplett will have his day in Court if that's what he wants on behalf of his client.

I don't believe the creation of presumptions or burdens of proof that may be imposed by [21] statute gives rise to a constitutional issue. But if they do, he again will have that right ultimately to present the arguments in Court.

The Trustees, of course, in this connection are fiduciaries [sic] for the sole benefit of the employees and make determinations as to withdrawing employer liability with that fiduciary [sic] obligation in mind.

The arbitrator's decision may be reviewed and insofar as I know, there is no case which holds—I can't imagine such case holding that the creation of a burden of proof of preponderance of the evidence gives rise to any constitutional issues.

Mr. Triplett suggested there is nothing for the arbitrator to decide. He suggested again that there is complete

agreement on facts. We are not prepared to suggest there is complete agreement on facts. No discovery has been had today. And, we expect that the arbitrator will be required to find factual matters in connection with when the labor dispute started and how long it continued and when Gray was a withdrawing employer. Those are things we would expect findings of fact on.

I heard Mr. Triplett's argument about the bonding capacity of his client and how this somehow creates some irreparable harm. I don't know, first of all, [22] what the difference is between this contingent liability and any other contingent liability that an employer faces in any kind of litigation in which he is involved.

But secondly, I don't know, and I can't conceive of what value a preliminary injunction does. The preliminary injunction doesn't say he is not required to pay the \$201,000. It simply says he doesn't have to pay it yet until the determination is made. And, Mr. Triplett's client has that opportunity right now. The preliminary injunction does not change the facts of whether he does or does not owe; and, if he is required to put it on the balance sheet, and if no preliminary injunction is granted, it would appear to me he would be required to put it there in any event until there is a final determination.

As to the fact that he has to know the cost he is incurring so liability that he doesn't know about that he has to factor into a bid, the contribution that the Trust has requested and intends to enforce are comparable to those contributions being made by contributing employers; those who do belong to the unions and have union contracts and are continuing to make the contributions into the Trust, that is a factor that each of the competing bidders is required to take into consideration.

[23] Mr. Triplett is incorrect with respect to the liquidated damages. I believe the statute gives a right up to 20 percent liquidated damages. But the Trust must select a factor. The factor that this Trustee has selected is based upon the interest rate of money at the time, which may or may not be 20 percent. But it amounts to what it costs the Trust for not having the money when it was entitled to

have it. That is liquidated damages that Mr. Gray would be required to pay.

Insofar as the cost of arbitration, Mr. Gray may be prepared to waive arbitration. The Trustees are not. The statute requires us to proceed if he demands arbitration. If not, then we will simply try and collect the money which we believe is due. If he does demand arbitration and prevails, the statute, 164221(a)(2) [sic] [Section 4221(a)(2)] gives the arbitrator the right to assess costs where the arbitrator thinks they should be, including the allowance of the attorney's fees if the arbitrator comes to the conclusion that should also be awarded for one party or the other.

So the cost is a factor. It may or may not be recovered by the employer.

In any event, the statute gives us—gives him that option to choose.

[24] The only other argument suggested in the brief in support of the motion for temporary injunction, I believe, which is not addressed by Mr. Triplett was the cash flow reduction. Again, we concur with Your Honor, there simply has been no showing which gives rise to irreparable harm. And, the employer has the option available to it that you suggested; and, we believe that the statute should be followed and followed promptly. We concur that there is no reason at the present time to decide the motion for summary judgment. We think they are not ripe. We should ultimately establish whether there is or is not withdrawal liability first.

\* \* \*

[26] [By Mr. Fellner:] We think it is critical that employers who withdraw are not permitted to truncate [sic] [truncate] the process which has been established to determine whether or not there has been a withdrawal, the appropriate amounts of withdrawal liability and the myriad of other factual and other legal issues which are properly before arbitration.

This is the process that the statute has set up. This is the process, we submit as Your Honor previously indicated, this is the process that should be exhausted.



With regard to irreparability—I guess the reason I set between the two sides is because P.B.G.C. finds itself in disagreement to an extent with both sides. It is our view, to further buttress your conclusion that pending arbitration, there is no acceleration, there is no default, and there are no liquidated damages as long as Gray exhausts its remedies available to it under the Act, then it will not be saddled with the [27] kinds of accelerated responsibility of some \$206,000 that we have heard about this morning.

We submit as indicated in our brief that the statute supports this fundamental policy conclusion that we have arrived at, specifically in Section 4221(b)(1) of the statute, it reads:

“If no arbitration proceeding has been initiated pursuant to subsection (a), the amount demanded by the plan sponsor shall be due and owing on the schedule set forth by the plan’s sponsor.”

We submit that the implication of that sentence is that if an arbitration has been initiated pursuant to subsection (a), the amounts demanded by the plan sponsors are not due and owing. That conclusion is buttressed by the second sentence of Section 4221(d); and, that sentence reads:

“If the employer fails to make timely payment in accordance with such final decision of the arbitrator, the employer shall be treated as being delinquent in the making of the contribution required under the plan.”

The clear implication of that sentence is no delinquency occurs until and unless there is a [28] final decision by an arbitrator.

Now we would be the first to concede, Your Honor, this statute is complex; and, in some respects, it is not the model of clarity. But on this particular issue, we feel that the salutary purpose of the policy we have enunciated in this brief, a policy which we are working on currently, reducing it to a regulation, that this salutary policy, combined with statutory provisions referred to as well as the legislative history recounted in our brief, make it clear that there is no acceleration, no default, no liquidated damages during the pendency of arbitration proceeding.

Finally, Your Honor, even if our reading of the statute is erroneous, and we submit as Mr. Crow has properly indicated that what Mr. Triplett has indicated this morning does not rise to the level of irreparable harm. The simple paying of money has been held time and again beginning with *Sampson v. Murray*—

THE COURT: I am aware of that.

\* \* \*

[31] [By Mr. Triplett:] Now, secondly, there was a statement made by counsel for the Pension Benefit Guaranty Corporation that (a) there is no acceleration and (b) no liquidated damages. I would love to join him in having that declared to be the law. But counsel selected only a portion of the law and did not bring the Court's attention to the immediately prior section 4219 in which it says: "Withdrawal liability shall be payable in accordance [32] with the schedule set forth by the plan's sponsors \* \* \* notwithstanding any request for review or appeal of the amount of such liability or the schedule." So, this section of the law says, "notwithstanding review, the money is owing."

THE COURT: Doesn't the reading of the two sections indicate not immediately?

MR. TRIPLETT: In the same section where they say notwithstanding the pendency of, they then say, if you don't pay, you're in default. It falls within the same section of the statute. In a completely different section of the statute is the statute that is referred to by counsel for the Government.

Quite frankly, it is a nightmare to know whether those oblique statements under the arbitration provision—

THE COURT: What is the defendant's position on that if plaintiff should seek arbitration?

MR. CROW: We do not concur with the pension Benefit Guaranty Corporation attorney on the law. We believe we are entitled to give notice of acceleration. It could be as Mr. Fellner says, if they are adopting regulations that will supersede ours, that might be the case. But at this point, we believe we are entitled to accelerated damages if quarterly payments are not made.

[33] THE COURT: Even if request for arbitration?

MR. TRIPLETT: Well, I would like to join with the Government quite obviously on whether acceleration is permissible pending review and whether liquidated damages can be assessed despite a request for review. We don't know what the law on the subject is. There is great risk to my client in the absence of a ruling. There are two sections of the statute which appear to be diametrically opposite positions on that.

\* \* \*

[39] [By Mr. Fellner:] I think it is very important to perceive that the interests of some pension funds, as well as the interests of some employers who are withdrawing, are shared.

And, consequently, it is absolutely important that arbitration proceed so that the real factual issues that are present in these cases are ventilated before the legal issues are decided.

THE COURT: I will rule this week. I understand the time restraint. I may be advising you before an opinion is issued of my ruling.

As I hear the arguments, if I rule against the employer for a preliminary injunction, arbitration would be the consequences. Obviously, my ruling isn't going to change your options. There are other options available as I indicated earlier. But let me give your arguments, which were very excellent, some further thoughts. I will rule yet this week.

(Conclusion of proceedings.)

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

Civil No. 81-912-RE

OPINION

R.A. GRAY & Co., PLAINTIFF,

v.

OREGON-WASHINGTON CARPENTERS-EMPLOYERS PENSION  
TRUST FUND AND PENSION BENEFIT GUARANTY  
CORPORATION, DEFENDANTS.

Thomas M. Triplett  
Mildred J. Carmack  
Schwabe, Williamson, Wyatt,  
Moore & Roberts  
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Attorneys for Plaintiff.

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Attorneys for Defendant  
Oregon-Washington Carpenters-  
Employers Pension Trust Fund.

[2]

Henry Rose, General Counsel  
Baruch A. Fellner, Associate General Counsel  
J. Stephen Cafilisch, Special Counsel  
David F. Power, Attorney  
Pension Benefit Guaranty Corporation

Office of the General Counsel  
 2020 K Street, N.W.  
 Washington, D.C 20006  
 Attorneys for Defendant  
 Pension Benefit Guaranty  
 Corporation.

REDDEN, Judge:

Plaintiff R.A. Gray and Co. (Gray) moves for entry of a preliminary injunction ordering the defendant Oregon Washington Carpenters-Employers Pension Trust Fund (Trust) to: (1) withdraw its notification of assessment against Gray during the pendency of this action and (2) to take no further steps to collect or to declare Gray in default for failure to pay a sum allegedly owed to the Trust. That sum is \$202,359.00 for "withdrawal liability" based on Gray's purported withdrawal from the Revised Pension Plan for the Oregon-Washington Carpenters-Employers Pension Trust Fund (Plan) which is administered by the Trust. Gray's complaint denies that Gray is subject to withdrawal liability. The complaint also alleges the unconstitutionality of the Employment [sic] Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001 *et seq.*, as amended by the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), 29 U.S.C.A. §§ 1301-1461 (Supp. 1981). The Trust and the Pension Benefit Guaranty Corporation (PBGC) oppose the entry of a preliminary injunction. The Trust and Gray have filed cross motions for summary judgment.

### FACTS<sup>1</sup>

#### 1. Parties

Gray is an Oregon corporation which entered successive [3] collective bargaining agreements with the Oregon State Council of Carpenters (Union). The Trust is a trust administered according to the Plan. The Plan is a multiemployer benefit plan within the meaning of ERISA, 29 U.S.C. §

<sup>1</sup> The facts, drawn from the complaint and supporting documents, are taken as true for the purpose of the motion for a preliminary injunction and do not constitute findings of fact.

1301(a)(3). The trustees of the Plan are the plan sponsors as defined in 29 U.S.C. § 1301(a)(10). Gray made contributions to the Trust in accordance with Gray's collective bargaining agreement with the Union. PBGC is a wholly owned United States Corporation which was created by ERISA to administer the pension plan termination program. PBGC shares responsibility for enforcing the mandatory multiemployer pension plan withdrawal liability program which was created by the MPPAA.

## *2. Background*

In February 1980 Gray notified the Union that, effective June 1, 1980, Gray was ending its collective bargaining agreement with the Union. In June 1980, the Union began a strike which still continues. In a letter dated July 24, 1981, the trustees of the Trust notified Gray that Gray had completely withdrawn from the Trust as of June 1, 1980 by reason of (1) the termination of Gray's obligation to contribute to the Trust as of June 1, 1980 and (2) Gray's continuation of work within the same jurisdiction. The letter stated that under section 4211(b) of ERISA Gray had a withdrawal liability of \$202,305.00. The trustees demanded payment and stated that payment was to be made in quarterly payments with the initial payment due sixty days from July 24, 1981. In response, Gray requested that the trustees review the computation of liability.

In a letter dated September 25, 1981, the Plan administrator notified Gray that its initial quarterly payment of withdrawal liability was delinquent and that if the quarterly payment was not received within 60 days, Gray would be in default. The letter also stated that if Gray were in default, the trustees would demand immediate payment of the entire withdrawal liability.

[4] On September 29, Gray filed its complaint in this action. In the complaint Gray denies that it has withdrawn from the Plan and alleges that the MPPAA, as applied to Gray: (1) violates the fifth amendment of the United States Constitution by arbitrarily imposing retroactive liability, (2) violates the fifth and seventh amendments by compelling Gray to submit to arbitration, (3) violates the fifth amendment by imposing disproportionate liability of



employers who contribute to other kind of plans and (4) violates article I, section 9 by imposing penalties for events which occurred before the enactment of the MPPAA.

### **THE MPPAA**

The MPPAA imposes liability on an employer who withdraws from a multiemployer plan. The liability is a portion of the unfunded vested benefits and is computed under one of several formulas. The statute was enacted on September 26, 1980 with an effective date of April 29, 1980. Gray challenges the retroactive application of the statute. Section 1399(b)(1) provides that after an employer's withdrawal, the plan sponsor shall notify the employer of the amount of liability and the schedule of payment and demand payment accordingly. Section 1399(c)(2) provides that in the event of default (defined as failure to pay within 120 days of initial demand), a plan sponsor may require immediate payment of the outstanding withdrawal liability plus accrued interest on the payment not timely made. Liquidated damages for delinquent payment of withdrawal liability are available in a suit for delinquent payments under §§ 1132(g)(2) and 1451. Section 1401 provides that a dispute between an employer and plan sponsor concerning the amount of liability shall be resolved through arbitration, initiated by either party within a specified period, and if arbitration is not initiated, the accounts demanded by the plan sponsor are due and owing on the schedule set forth by the plan sponsor.

### **[5] MOTION FOR A PRELIMINARY INJUNCTION**

#### **1. The Standard**

In order to obtain a preliminary injunction Gray has the burden of demonstrating:

either (1) a combination of probable success on the merits and the possibility of irreparable injury or (2) that serious questions are raised and the balance of hardship tips sharply in its favor. [citation] These are not separate tests but the outer reaches "of a single continuum." *Benda [v. Grand Lodge of International Association of Machinists, etc.]*, 584 F.2d 308, 315 (9th Cir. 1978), cert. dismissed 441 U.S. 937 (1979)].

*Los Angeles Memorial Coliseum Com'n v. Nat. Football League*, 634 F.2d 1197, 1201 (9th Cir. 1980). To meet its burden under this standard, Gray must demonstrate, at a minimum, the possibility of irreparable injury.

In *Los Angeles Coliseum*, *supra*, the trial court found that the injury to the movant was "lost revenues." *Id.* at 1202. The Ninth Circuit reversed the order granting a preliminary injunction because the plaintiff had not made the requisite showing of irreparable harm. *Id.* at 1203. The court said:

Even if some significant threat of injury be hypothesized, it was neither found nor shown to be *irreparable*. [emphasis by the court] The basis of injunctive relief in the federal courts is irreparable harm and inadequacy of legal remedies. *Sampson v. Murray*, 415 U.S. 61, 88 ... (1974).

*Id.* at 1202. The court then quoted *Sampson v. Murray*, 415 U.S. at 90,

[T]he temporary loss of income, ultimately to be recovered, does not usually constitute irreparable injury ... 'The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended ... are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.'

*Id.*

#### [6] 2. *Gray's Argument*

Gray alleges that it will suffer irreparable harm if an injunction is not entered restraining the Trust from collecting any of the alleged withdrawal liability. The irreparable harm alleged is (1) "the loss of use of substantial amounts of capital" which Gray must pay the Trust to avoid further liability and (2) "unnecessary arbitration proceedings."

Gray argues that because ERISA does not explicitly state that the Trust has the obligation to repay funds wrongfully received, there is the possibility of damage to Gray if it makes payment and there is a later determination that Gray does not owe the money. Gray also argues that



unless the Trust's attempt to collect the money is restrained, Gray will suffer impaired bonding capacity and inflated bids which will result in a reduction of income. Gray argues that if it engages in arbitration and the court later finds the statute unconstitutional, Gray will have been subjected to unnecessary expense in connection with the arbitration.

### 3. Discussion

I am denying Gray's motion for a preliminary injunction because I find that Gray has failed to demonstrate the possibility of irreparable injury. Gray has demonstrated the possibility of lost revenues and the loss of time spent in arbitration. Gray has demonstrated that it would prefer to avoid paying the withdrawal liability and arbitration while seeking judicial review of the MPPAA.

I find that payment of the quarterly payments will not cause Gray irreparable harm. Gray has not alleged that the payments will jeopardize the existence of the company. Even if ERISA does not provide an explicit mechanism for the return of moneys determined to be wrongfully paid, Gray's loss would be recoverable. The attorneys for the Trust stated in oral argument that the Trust was prepared to agree that Gray will be entitled to a refund of [7] its contributions if it is ultimately determined that Gray owes less than it has paid. The attorneys for the Trust also stated that Gray's payments can be made to an escrow account which will be paid over to the prevailing party.

I find that Gray's spending time and money to arbitrate the dispute concerning its withdrawal liability will not cause Gray irreparable harm. "Mere litigation expense, even substantial and unrecoupable cost does not constitute irreparable injury." *Renegotiation Board v. Bannerkraft [sic] Clothing Co., Inc.*, 415 U.S. 1, 24 (1974). Gray alleges that it has not "withdrawn" within the meaning of the statute. This issue is particularly appropriate for resolution through the arbitration process. Such a resolution would be in accord with the well settled principle that the constitutionality of a statute should be addressed only as a last resort.

Because I have found that Gray has not demonstrated the threshold requirement of irreparable injury, I do not reach the question of the likelihood of success on the merits.

***MOTIONS FOR SUMMARY JUDGMENT***

The motions for summary judgment are not ripe for decision. If Gray requests arbitration then this case should be stayed pending the arbitrator's decision and the motions for summary judgment will be addressed after that decision. If Gray does not request arbitration, I will rule on the motions after full briefing of all the issues by all the parties.

Dated this 1st day of December, 1981.

/s/

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James A. Redden  
United States District Judge

U.S. DISTRICT COURT  
DISTRICT OF OREGON  
FILED  
DEC 1-1981  
Robert M. Christ, Clerk  
By: \_\_\_\_\_ Deputy

**ORDER**

**[CAPTION AND NAMES OF COUNSEL OMITTED  
IN PRINTING]**

[2] REDDEN, Judge:

IT IS ORDERED that plaintiff's motion for a preliminary injunction is denied.

Dated this 1st day of December, 1981.

/s/ \_\_\_\_\_  
James A. Redden  
United States District Judge

[CAPTION OMITTED IN PRINTING]  
ANSWER OF DEFENDANT PENSION BENEFIT  
GUARANTY CORPORATION TO COMPLAINT

*First Defense*

The complaint of R.A. Gray & Co. ("Gray") fails to state a claim against the Pension Benefit Guaranty Corporation (the "PBGC") upon which relief can be granted.

*Second Defense*

For its answer to the specific allegations of the complaint, the PBGC states:

I.

*Jurisdiction*

The PBGC admits the existence of the statutory provisions cited in the two unnumbered paragraphs of the complaint under the caption, "JURISDICTION," but denies that jurisdiction is granted or venue established solely on the basis of those provision.

II.

*Parties*

The allegation contained in the second of the three unnumbered paragraphs of the complaint under the caption, "PARTIES," [2] that the Oregon-Washington Carpenters-Employers Pension Trust Fund (the "Trust") is the plan sponsor of a multiemployer pension plan, is denied. The PBGC is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in the first and second unnumbered paragraphs of the complaint under the caption, "PARTIES."

The PBGC admits the allegation contained in the third unnumbered paragraph of the complaint under the caption, "PARTIES," that the PBGC is a body corporate established by Title 29 U.S.C. §1302. The allegation contained in the third unnumbered paragraph of the complaint under the caption, "PARTIES," that the PBGC "is charged by law with the implementation and enforcement of ERISA, as

amended by MPPAA," is denied insofar as it implies that sole or primary responsibility rests with the PBGC.

### III.

#### *Claim for Relief Against the Trust*

1-2. Unless otherwise specified, references to paragraphs of the complaint in this paragraph and the following paragraphs 2 through 12 of this answer refer to paragraphs of the complaint under the caption, "CLAIM FOR RELIEF AGAINST THE TRUST." The PBGC is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 1 and 2 of the complaint.

3. The allegations contained in paragraph 3 of the complaint are denied insofar as they imply that, either before or after enactment of the Multiemployer Pension Plan Amendments Act of 1980 (the "Multiemployer Act"), Pub. L. No. 96-364 (1980), 29 U.S.C.A. §§1001-1461 (Supp. 1981), Gray's financial obligations under the Revised Pension Plan for the Oregon-Washington Carpenters-Employers Pension Trust Fund (the "Plan") arose solely from the terms of the Plan and collective bargaining agreements providing for contributions to the Plan. Section 10.03 of the Plan provides, in part, as follows: "*Except for liabilities which may result from provisions of ERISA*, nothing in this [3] plan shall be construed to impose any obligation to contribute beyond the obligation of the Employer to make contributions as stipulated in its collective bargaining agreement with the Union." Plan, p. 24 (emphasis added). Withdrawal liability under the Multiemployer Act is a liability which "*result[s] from provisions of ERISA.*" The PBGC is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 3 of the complaint.

4-5. The PBGC is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 4 and 5 of the complaint.

6. The PBGC admits the allegation contained in paragraph 6 of the complaint that the Multiemployer Act was enacted on September 26, 1980, and admits the existence of

the Employee Retirement Income Security Act of 1974 ("ERISA"), but relies upon those statutes to speak for themselves.

7. The PBGC admits the allegations contained in paragraph 7 of the complaint.

8. The allegations contained in paragraph 8 of the complaint are denied.

9. The allegations contained in paragraph 9 of the complaint are denied.

10. The allegation contained in paragraph 10 of the complaint that the "arbitrator's findings will be presumptively correct," is denied insofar as it implies that anything other than the arbitrator's findings of fact will be presumptively correct upon judicial review. The PBGC admits the remaining allegations contained in paragraph 10 of the complaint.

11. The PBGC is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 11 of the complaint.

12. The allegations contained in paragraph 12 of the complaint, including the allegations contained in subparagraphs 12(a), 12(b), 12(c), 12(d), and 12(e) of the complaint, are denied.

[4] IV.

*Claim for Relief Against the Corporation*

1. Unless otherwise specified, references to paragraphs of the complaint in this paragraph and the following paragraphs 2 and 3 of this Answer refer to paragraphs of the complaint under the caption "CLAIM FOR RELIEF AGAINST THE CORPORATION." In response to paragraph 1 of the complaint, the PBGC incorporates by reference and restates its responses to paragraphs 1 through 12 of the complaint under the caption "CLAIM FOR RELIEF AGAINST THE TRUST."

2. The allegation contained in paragraph 2 of the complaint that the PBGC "is the body charged by Congress with implementation of ERISA as amended by the MPPAA," is denied insofar as it implies that sole or primary responsibility rests with the PBGC. The PBGC ad-

mits the remaining allegations contained in paragraph 2 of the complaint.

3. The allegations contained in paragraph 3 of the complaint are denied.

Further answering the complaint, defendant PBGC denies all allegations not specifically answered or admitted and denies that the plaintiff is entitled to any relief.

#### *Third Defense*

The complaint fails to present for adjudication a genuine case or controversy. Accordingly, this court lacks subject matter jurisdiction over the complaint.

#### *Fourth Defense*

This action is premature and not ripe for adjudication because plaintiff Gray has not initiated arbitration proceedings, as required by section 4221(a)(1) of ERISA, 29 U.S.C.A. §1401(a)(1) (Supp. 1981), and has consequently failed to exhaust its nonjudicial remedies.

#### *Fifth Defense*

This action is premature and not ripe for adjudication because the applicability of the exemptions and relief provisions created by statute has not been determined.

[5]            /s/ \_\_\_\_\_  
                  HENRY ROSE  
                  General Counsel

                 /s/ \_\_\_\_\_  
                  BARUCH A. FELLNER  
                  Associate General Counsel

                 /s/ \_\_\_\_\_  
                  J. STEPHEN CAFLISCH  
                  Special Counsel

                 /s/ \_\_\_\_\_  
                  DAVID F. POWER  
                  Attorneys for Defendant  
                  PENSION BENEFIT GUARANTY  
                  CORPORATION



## AFFIDAVIT OF THOMAS M. TRIPLETT

[CAPTION OMITTED IN PRINTING]

STATE OF OREGON                    )  
   ) ss.  
 COUNTY OF MULTNOMAH )

I, THOMAS M. TRIPLETT, being first duly sworn depose and say:

Attached hereto marked Exhibits A and B are the actuarial reports of the Oregon-Washington Carpenters-Employers Pension Trust Fund for the years ending June 30, 1979 and June 30, 1980. Attached hereto marked Exhibit C is the Trust Plan of the Oregon-Washington Carpenters-Employers Pension Trust Fund.

[2] DATED this 16th day of November, 1981.

/s/ \_\_\_\_\_

SUBCRIBED AND SWORN TO before me this 16th day of November, 1981.

/s/ \_\_\_\_\_

*Notary Public For Oregon*  
*My Commission Expires: 9/13/85*



[3]

**[EXHIBIT A TO AFFIDAVIT OF THOMAS M. TRIPLETT]**

**OREGON-WASHINGTON CARPENTERS-  
EMPLOYERS PENSION TRUST FUND**

Sixteenth Annual  
Actuarial Valuation and Review  
for the Year Ended June 30, 1979

Copyright © by  
Martin E. Segal Company  
January, 1980

[4]                   **MARTIN E. SEGAL COMPANY**  
**[PORTION OF LETTERHEAD OMITTED**  
**IN PRINTING]**

January 17, 1980

Board of Trustees  
Oregon-Washington Carpenters-Employers  
Pension Trust Fund  
Portland, Oregon

Gentlemen:

We are pleased to submit our actuarial valuation as of July 1, 1979 and the experience review of the Pension Trust for the year ended June 30, 1979. The contents of this sixteenth annual report will be found in the following sections:

- A. HIGHLIGHTS OF THE YEAR
- B. EMPLOYEE DATA
- C. ANALYSIS OF ACTUARIAL EXPERIENCE
- D. SCHEDULED ACTUARIAL COST
- E. MINIMUM FUNDING STANDARD ACCOUNT
- APPENDIX: GENERAL BACKGROUND
- ATTACHMENT: ACTUARIAL VALUATION
- CERTIFICATE

We look forward to reviewing this report with you at your next meeting. At that time, we will discuss any questions which the Board may have concerning the findings of this study.

Sincerely,

/s/

\_\_\_\_\_  
**JAMES P. LOWE**  
*Vice President*

fp  
cc: Administrator  
Co-Legal Counsel  
Accountant  
Investment Counsel

[5]

### A. HIGHLIGHTS OF THE YEAR

The Pension Fund's experience during the 1978-79 fiscal year is summarized as follows:

- By June, 1979, the Trustees had awarded 3,435 pensions, 2,248 of which were still in the course of payment. Pension payments were being continued to 99 beneficiaries. Actual benefit payments amounted to \$3,965,400 for the year.

- Effective July 1, 1979, the Plan was amended to recognize an additional Benefit Unit each year until it reaches 35 units.

- The active membership increased by 12.6% while the total employment activity was almost 18% higher than the prior year's level.

- Contribution income increased by 32% as a direct result of the greater employment activity and a higher contribution rate. Administration expenses were 2.2% of the contributions received.

- Net interest and dividend income produced a return of 5.69%. A review of these results over recent years showed an average return of 4.76%. On the valuation date, 40% of the total invested assets consisted of equities.

- At the end of the 1978-79 Plan Year, Fund reserves reached \$45.9 million—a 19% increase over last year. About 72% of these assets were required to provide lifetime benefits to those members already on the pension rolls.

- Fund assets represented 56% of the Plan's vested liabilities at the end of the year.

- As of July 1, 1979 the Minimum Funding Standard Account showed a funding balance credit of \$4,596,800. The overall Fund experience produced a net experience gain for the year.

\* \* \*

[10]

## C. ANALYSIS OF ACTUARIAL EXPERIENCE

### *Introduction*

Actuarial assumptions are made with respect to each aspect of the operation of the fund which affects the accumulation of assets and the disbursement of benefits. As a few examples, assumptions are made regarding the rate of investment return on assets, percent of non-retired participants terminating employment, mortality probabilities for both retired and non-retired participants, and average retirement age among non-retired participants. When experience is, on the whole, financially favorable (for example, investment income is greater than assumed or participants are, on the average, retiring at an older age than anticipated), the fund realizes experience gains. The unfunded accrued liability is reduced by the full amount of the gain and the future contribution requirement is reduced by the amortization of the gain. The reverse is, of course, true if experience is unfavorable relative to the actuarial assumptions.

Since the use of realistic assumptions is an important element in the determination of cost projections, ERISA requires a certification, by an Enrolled Actuary, that the assumptions utilized in the valuation represent the actuary's "best estimate" of future experience under the Plan. The selection of assumptions which satisfy this criterion requires a periodic examination of past experience. An abridged analysis was performed for the year ended June 30, 1979 based on the actuarial assumptions and benefit provisions reflected in the previous valuation. We will continue to review future experience to determine when changes in assumptions are warranted.

### *Aggregate Experience*

On July 1, 1978, the unfunded accrued liability stood at \$60,663,200. For minimum funding purposes, it had been anticipated that this liability would have been reduced by \$704,300 to \$59,958,900 at the end of the year (June 30, 1979) if the actuarial experience had exactly matched the

actuarial assumptions. The overall actual experience of the Fund during the year, which was more favorable than expected, reduced the latter liability to \$56,183,400. This reduction (\$3,775,500) was the result of contribution income in excess of the minimum funding requirement for the year and an actuarial experience gain of \$1,311,700.

\* \* \*

[16]

The Fund, of course, has liabilities not only for presently retired employees but for active and inactive employees who will retire in the future. A summary comparison of Fund assets against liabilities for pensioners and vested employees is as follows:

	Number of Employees	Vested Liabilities
Pensioners and beneficiaries	2,347	\$33,171,300
Non-retired employees eligible for immediate retirement on Regular Pensions		
Active	45	1,428,100
Inactive	215	3,108,900
Non-retired employees eligible for immediate retirement on Early Retirement Pensions		
Active	812	22,309,800
Inactive	268	5,802,900
Other vested employees		
Active	1,206	13,333,700
Inactive	300	3,116,700
Total	5,223	\$82,271,400
Fund Net Assets		45,897,200
Unfunded Vested Liability		\$36,374,200

As of July 1, 1979 the Fund assets represented 56% of the Plan's vested liability.

\* \* \*

### [22] 3. *Investment Experience*

For valuation purposes, marketable securities are carried at an adjusted book value which systematically reflects a portion of the capital appreciation or depreciation on investments. Such asset values are affected by dividend and interest income and the annual write-up/down on the mar-

ketable securities. In measuring experience against the interest assumption, it is necessary to take all of these types of earnings into consideration.

During the year 1978-79, such earnings, net of investment fees of \$133,087 totalled \$2,326,084, representing a return of 5.69% on the Fund assets. This return represents a net asset gain of \$282,900, relative to the 5.00% assumption. The total earnings include dividend and interest income of \$2,563,806 equal to 6.27% of assets, and a write-down amount of \$237,722. The determination of the total adjusted book value for marketable securities is shown in Table 9. It should be noted that an investment fluctuation deficiency of \$950,889 existed on the valuation date.

Table 10 traces the components of total investment returns over recent years and shows how those amounts relate to the interest assumptions used. Over the period, the total earnings of \$7.4 million represented an average annual return rate of 4.76%. The corresponding figure exclusive of net realized capital losses (and amounts of write-up/down) of \$724,800 was 5.22%.

On June 30, 1979, the adjusted book value of the Fund's assets amounted [sic] \$45,897,231, showing a 19% increase over the assets of a year ago. A statement of assets for the years ended June 30, 1979 and 1978 is given in Table 11.

A summary of the investment portfolio as of June 30, 1979 is shown in Table 12. A comparison of the cost value versus the market value of the investments is given for your general interest. About 40% of the invested assets consisted of equities.

A picture of the Fund's financial development over its entire period of operations is given in Table 13. It illustrates the rise in contribution income, benefit payments and the ever-growing size of the net assets needed to finance lifetime benefits for existing pensioners as well as those employees who will be retiring in the future.

\* \* \*

[33]

**MARTIN E. SEGAL COMPANY****[PORTION OF LETTERHEAD OMITTED IN PRINTING]**

January 17, 1980

**OREGON-WASHINGTON CARPENTERS-EMPLOYERS  
PENSION TRUST FUND***Actuarial Valuation Certificate*

This is to certify that we have prepared an actuarial valuation of the Plan as of July 1, 1979.

The certificate contains the following attached exhibits:

- I: Actuarial Cost for Year Beginning July 1, 1979
- II: Actuarial Assumptions and Funding Method
- III: Minimum Funding Standard Account
- IV: Changes in Actuarial Assumptions
- V: Plan Amendment
- VI: Summary of Plan Provisions

The valuation was based on the assumption that the Plan was qualified for the year and on information supplied by the auditor with respect to contributions and assets and by the Fund Manager with respect to the data required on employees and pensioners.

To the best of my knowledge, the information supplied in this actuarial valuation is complete and accurate (except as may be noted in Exhibit I) and in my opinion the assumptions used in the aggregate: (a) are reasonably related to the experience of the Plan and to reasonable expectations; and (b) represent my best estimate of anticipated experience under the Plan.

**MIGUEL A. PADRO, A.S.A., M.A.A.A.  
ENROLLED ACTUARY No. 147  
ASSOCIATE ACTUARY**

\* \* \*



[35]

**EXHIBIT II****ACTUARIAL ASSUMPTIONS AND FUNDING METHOD**

Mortality rates: 1971 Group Annuity Table (with ages advanced one year).

Disability mortality before age 65: Assumed as age 65 in above Table.

Termination rates before retirement:

Age	Rate %			
	Death	Disability	Withdrawal	Total
20	.05	.05	7.90	8.00
25	.07	.05	7.68	7.80
30	.09	.05	7.18	7.32
45	.33	.18	3.82	4.33
50	.59	.40	2.22	3.21
55	.93	.85	.20	1.98
60	1.44	1.74	—	3.18
65	2.36	—	—	2.36
70	4.00	—	—	4.00

Retirement Age: For non-disability retirements: age 63, or completion of service requirement, if later.

Investment Return: 5.00% per annum.

Future Service Accrual Rate: 1.125 Benefit Unit per year.

Contribution Income: 1,475 hours per active employee

Administration expenses: \$225,000 per year.

Funding Method: Entry Age Normal Cost.

Valuation of Assets: At Adjusted Book Value\*.

\*Adjusted Book Value at beginning of year (increased by new money) written up/down by 20% of the difference between Market Value and this figure. The result must not be less than 80% nor greater than 120% of market value; otherwise, a further adjustment will be made.

\* \* \*

[43]

[EXHIBIT B TO AFFIDAVIT OF THOMAS M. TRIPLETT]

**OREGON-WASHINGTON CARPENTERS-  
EMPLOYERS PENSION TRUST FUND**

Seventeenth Annual  
Actuarial Valuation and Review  
for the Year Ended June 30, 1980

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MARTIN E. SEGAL COMPANY  
January, 1981

[44]           **MARTIN E. SEGAL COMPANY**  
**[PORTION OF LETTERHEAD OMITTED IN PRINTING]**

January 30, 1981

Board of Trustees  
Oregon-Washington Carpenters-Employers  
Pension Trust Fund  
Portland, Oregon

Gentlemen:

We are pleased to submit our Actuarial Valuation as of July 1, 1980 and the experience review of the Pension Fund for the year ended June 30, 1980. The contents of this seventeenth annual report will be found in the following sections:

- A. HIGHLIGHTS OF THE YEAR
- B. EMPLOYEE DATA
- C. ANALYSIS OF ACTUARIAL EXPERIENCE
- D. SCHEDULED ACTUARIAL COST
- E. VESTED LIABILITIES
- F. FUNDING STANDARD ACCOUNT
- APPENDIX: GENERAL BACKGROUND
- ATTACHMENT: ACTUARIAL VALUATION  
CERTIFICATE

The employee data which served as the basis for the calculations was supplied to us by the Fund Office staff. Their assistance is gratefully acknowledged.

The actuarial calculations were supervised by Miguel A. Padro, A.S.A., Enrolled Actuary.

We look forward to reviewing this report with you at your next meeting. At that time, we will discuss any questions which the Board may have concerning the findings of this study.

Sincerely,

/s/

\_\_\_\_\_  
JAMES P. LOWE  
*Vice President*

fp

Copies to: Fund Office  
Co-Legal Counsel  
Accountant  
Investment Counsel

[45]

### A. HIGHLIGHTS OF THE YEAR

The Pension Fund's experience during the 1979-80 fiscal year is summarized as follows:

- By June, 1980, the Trustees had awarded 3,667 pensions, 2,358 of which were still in the course of payment. The average pension amount, for new awards, was \$249 per month. Pro-rata pensions represent about 40% of the new pension awards. Pension payments were being continued to 88 beneficiaries. Actual benefit payments amounted to \$4,158,500 for the year.

- The active membership has shown a steady growth in recent years. During the 1979-80 year it increased by almost 16%. The number of participants has increased each year during the past 5 years. Nearly one half of the participants have attained vested rights.

- Total employment activity has increased 40% during the last three years. The 1979-80 activity was almost 13% greater than the previous year's level. Contribution income increased by 21% as a result of the greater employment activity and a higher contribution rate. Administration expenses were 1.8% of the contributions received.

- Net investment income produced a return of 8.68% for the year. A review of these results over recent years showed an average return of 5.70%. The current investment mix is 60% fixed income and 40% equities.

- At the end of the 1979-80 Plan Year, Fund reserves reached \$56.9 million—a 24% increase over last year. About 62% of these assets was required to provide lifetime benefits to those members already on the pension rolls.

- Fund assets represented 69% of the Plan's vested liabilities at the end of the year. During recent years, an increasingly larger percentage of the vested liability has been funded at the end of each year.

- As of July 1, 1980 the Funding Standard Account showed a funding balance credit of over \$8.7 million. The overall Fund experience produced a net experience gain for the year.

[46]

## B. EMPLOYEE DATA

### 1. *Active and Inactive Employees*

The Fund's actuarial position is redetermined each year on the basis of an updated census of covered employees. The survey includes members who worked at least 300 hours during the Plan Year and had earned a total of at least one full year of credited service by the end of the year. During the year 1979-80, a total of 7,965 employees satisfied the first condition—however, 1,306 of these members failed to earn at least one full year of credited service by the end of the year. The actuarial cost, therefore, was calculated on the basis of 6,659 employees who are designated as "active" for the purposes of this valuation. Those employees with less than one year of accumulated credited service are excluded since they are regarded as replacements of employees who left covered employment during the year but are still included in the census.

A summary of changes in the number of active employees and their basic data characteristics is shown in Table 1. The number of active employees increased by 15.6% over the previous year. The active membership has increased over 34% during the past three-year period.

Of the 6,659 active members, 1,990 (or 30%) had met the requirements for vested rights (including 805 members who were eligible to retire immediately). About three out of every four active employees worked at least 1,200 hours this year (over 25% worked more than 1,800 hours). The current census of active employees appears in Table 2.

On June 30, 1980 there were 857 employees who had met the requirements for vested rights compared to 813 the previous year. Though these members were inactive during the year—they failed to work at least 300 hours—the Fund has a potential liability to provide benefits to these members when they decide to retire. About 27% of these members were age 65 or older. A census of these employees is shown in Table 3. No account is taken of the potential liabilities for inactive employees who are not vested but who

may return to covered employment before they suffer a permanent break in service.

[47] 2. *Retired Employees*

The Trustees awarded 232 pensions during the year ended June 30, 1980. Distributions of these new awards by type of pension, monthly benefit amount and age on the effective date are given in Tables 4 and 5. It is observed that: (a) 27% of these pensioners elected Husband-and-Wife Options; (b) the average new award (excluding Pro-Rata pensions) received \$249 per month; (c) 57% of the new awards (excluding Pro-Rata) were Early Retirements and 15% were Disability pensions; and (d) about 2 out of every 5 pensions were Pro-Rata pensions. The Trustees also granted 11 pre-retirement Death Benefit awards this year. A summary of recent pension awards by type of pension is shown in Table 6. Pro-Rata pensions represent about 45% of all the awards granted during the period. Among non-Pro-Rata pensions, Early Retirements account for 55% of the awards.

During the year 1979-80, two pensions were suspended, five were reinstated, 35 were cancelled or paid as lump sum and 90 were terminated due to death. On June 30, 1980, there were 2,358 pension awards still in the course of payment. The average pension amount among the existing pensioners (excluding Pro-Rata and Basic pensions), on the valuation date, was \$170 per month compared to \$162 per month the previous year. (The pension amounts ranged from less than \$100 to a highest of \$390 per month.) In addition to the pensioners on the rolls, there were 88 beneficiaries receiving benefits for an aggregate amount of \$11,823 per month. Table 7 shows a distribution of the pensioners on the rolls as of June 30, 1980 by type of pension and monthly benefit amount. The same awards are distributed in Table 8 by type of pension and age on the valuation date.

The progress of the pension rolls is given in Table 9. Of the 3,667 pensions awarded since pension payments began in July, 1963, 802 have been terminated on account of death, 13 are in a suspended status and 494 cancelled by other reasons (i.e., lump-sum settlements) as of June 30,



1980. Actual benefit payments amounted to \$4,158,514 during the year compared to \$3,965,367 the previous year.

### 3. *Summary of participants*

A summary of the number of participants for recent years is shown in Table 10. The number of participants has increased steadily during the past five years. Due to the influx of new carpenters, the percentage of participants who have attained vested status has dropped from about 60% five years ago to about 50% in the past two years.

\* \* \*

[58]

## C. ANALYSIS OF ACTUARIAL EXPERIENCE

### *Introduction*

Actuarial assumptions are made with respect to each aspect of the operation of the fund which affects the accumulation of assets and the disbursement of benefits. As a few examples, assumptions are made regarding the rate of investment return on assets, percent of non-retired participants terminating employment, mortality probabilities for both retired and non-retired participants, and average retirement age among non-retired participants. When experience is, on the whole, financially favorable (for example, investment income is greater than assumed or participants are, on the average, retiring at an older age than anticipated, the fund realizes experience gains. The unfunded accrued liability is reduced by the full amount of the gain and the future contribution requirement is reduced by the amortization of the gain. The reverse, of course, is true if experience is unfavorable relative to the actuarial assumptions.

Since the use of realistic assumptions is an important element in the determination of cost projections, ERISA requires a certification, by an Enrolled Actuary, that the assumptions utilized in the valuation represent the actuary's "best estimate" of future experience under the Plan. The selection of assumptions which satisfy this test requires a periodic examination of past experience. An abridged analysis was performed for the year ended June 30, 1980 based

on the actuarial assumptions and benefit provisions reflected in the previous valuation.

\* \* \*

[72]

#### D. SCHEDULED ACTUARIAL COST

On an overall basis, the Fund's experience during the year 1979-80 was such that on June 30, 1980, about 54% of the total accrued liability of \$104.8 million had been funded. The unfunded accrued liability decreased from \$59.5 million at the beginning of the year to \$47.9 million at the end of the year. A development of this change is given in Table 19.

Our income projection assumes that contributions will be received for an average of 1,475 hours per active employee (but in no event more than 8.0 million hours). The unfunded accrued liability is being amortized over a period of 26 years from July 1, 1980 in accordance with the latest schedule adopted by the Board of Trustees.

At the current contribution rate of \$1.00 per hour and the assumed level of employment activity, contributions will exceed the projected cost by 8.6¢ per hour. This comparison is shown below.

	Total Amount	Amount Per Active Employee	Equivalent Cents Per Hour	% of Gross Con- tributions
Normal Cost	\$3,668,700	\$ 551	\$ .458	45%
Payment on unfunded accrued liability	3,427,900	514	.428	43
Administration ex- penses	225,000	34	.028	3
Projected Gross Cost	\$7,315,600	\$1,099	\$ .914	91%
Expected Gross Contributions	8,000,000	1,201	1.000	100
Anticipated Margin	\$ 684,400	\$ 102	\$ .086	9%

There is, of course, reason for concern whether it is appropriate to continue to assume a contribution base of 8.0 million hours. Like any other assumption, the projection of the contribution base must be reasonable for the future in the light of the plan's experience. Assuming a higher contribu-

tion base reduces the cost requirement, on the other hand a lower contribution base increases the Plan's cost.

[73] Pension costs can be sorted into two categories— variable and fixed. If covered employment goes down, the number of active employees and the amount of current benefit accrual is likely to decrease too, although perhaps not in exact proportion. Basically, that is a variable cost. On the other hand, pensions already earned are a fixed cost. So is any past benefit earned, and particularly to the extent that it is already vested. These costs have to be carried by the plan even if total covered employment and the number of active employees declines.

We look to the Trustees for guidance in settling on the appropriate assumption as to contribution base and number of active employees. The Trustees should advise us if they know of other developments or foreseeable changes that are relevant to a proper judgment as to the future contribution base.

\* \* \*

[75]

#### E. VESTED LIABILITIES

The concept of unfunded vested liabilities has received substantial attention recently at most Board of Trustees' meetings as it relates to the recently enacted PBGC legislation. An employer withdrawing from the Plan after April 28, 1980 may have to be charged for withdrawal liability payments to the Plan. This is a new requirement of law, under the Multiemployer Pension Plan Amendments Act of 1980. The charge to any such withdrawn employer is a proration of the Plan's unfunded liability for vested benefits. At this time, the precise of definition of what the calculation of such liabilities involves is not clear. In any event, we have determined the lump sum present value of all vested accrued benefits under the plan payable at the assumed retirement ages. Should the Plan terminate on the valuation date, \$82.3 million would be needed to guarantee all vested participants their accrued pension payable at retirement.

	<u>Number of Employees</u>	<u>Vested Liabilities</u>
Pensioners and beneficiaries	2,446	\$35,539,800
Active-vested employees	1,990	34,736,300
Inactive-vested employees	857	12,014,200
Total	5,293	\$82,290,300
Fund Net Assets		56,896,400
Unfunded Vested Liability		\$25,393,900

As of July 1, 1980, therefore, the Fund's assets represented 69% of the vested liability. They were more than sufficient to pay off the pensioner's liability. A comparison between assets and vested liabilities for recent years is displayed in Table 20. It shows that an increasingly larger percentage of the vested liability has been funded by the end of each year.

The Board should keep in mind that these liabilities are based on the current valuation assumptions as to interest and mortality. The 5.50% interest assumption, which we feel is appropriate for long-term valuation of the Plan, would be overly conservative on a Plan termination basis. Additional calculations can be performed to show the effect of using higher interest rates (or PBGC assumptions) in the determination of the vested liabilities.

\* \* \*

[77]

#### F. FUNDING STANDARD ACCOUNT

ERISA requires all Pension Plans to conform to its minimum funding standards. As a result, the Plan established a Funding Standard Account effective July 1, 1976. Each year the Plan's Enrolled Actuary must update the account which is, in effect, an actuarial accounting statement. The status of the account is reported on Schedule B of the Plan's Form 5500, the annual report to the IRS and Department of Labor. The Multiemployer Pension Plans Amendment Act of 1980, enacted September 26, 1980, imposes stricter funding requirements for future benefit changes.

The Funding Standard Account tests compliance with minimum funding standards. If the account balance at the

end of a given Plan Year is positive, then the Plan is being funded on a basis that meets the legal minimum.

*Charges to the Funding Standard Account*

Each year the account is charged with:

- (a) The normal cost for the Plan Year, including an allowance for operating expenses.
- (b) The amount necessary to amortize in equal installments:
  - (1) The July 1, 1976 unfunded liability over a period of 40 years.
  - (2) The net increase in the unfunded liability arising from Plan Amendments (if any) over a period of 40 years (revised by the new law to 30 years for amendments effective after September 26, 1980).
  - (3) The net experience loss (if any) over a period of 20 years (revised by the new law to 15 years for losses occurring after September 26, 1980).
  - (4) The net loss (if any) which results from changes in actuarial assumptions over a period of 30 years.

[78] *Credits to the Funding Standard Account*

Each year the account is credited with:

- (a) Employer Contributions (including those previously unreported).
- (b) The amount necessary to amortize in equal installments:
  - (1) The net decrease in the unfunded liability as a result of Plan Amendments (if any) over a 40-year amortization period (revised to 30 years for amendments effective after September 26, 1980).
  - (2) The net experience gain (if any) over a period of 20 years (revised to 15 years for gains occurring after September 26, 1980).
  - (3) The net gain (if any) as a result of changes in actuarial assumptions over a period of 30 years.

An experience loss (or gain) occurs if experience under the Plan is less favorable (or more favorable) than the actuarial assumptions. The loss (or gain) is determined on an aggre-

gate basis (gains and losses from investment experience, mortality, disability, etc. . . , are all combined to determine a net gain or loss).

All charges and credits are credited with interest, at the valuation rate, to the end of the year.

The charges and credits to this account for the year ended June 30, 1980 are shown in Table 21. As of July 1, 1980, there was a credit balance of \$8,750,700. Therefore, the Plan continues to comply with ERISA minimum funding standards. This reserve is carried forward for the following year. It may be drawn upon to meet charges to the account should contributions fall below the net charge in some future year.

The net charge for the year 1980-81 is shown below:

Normal cost* .....	\$3,893,700
Net amortization charge** .....	<u>3,515,000</u>
Net charge for year 1980-81 .....	\$7,408,700

Taking the credit balance (\$8,750,700) into account, the minimum contribution requirement for the year 1980-81 is -0-.

\*Includes administration expenses.

\*\*From Exhibit III of the attached Actuarial Valuation Certificate.

[79] ERISA permits the Plan to establish its own funding policy, reflecting the Plan's particular circumstances and the Trustees' goals, so long as the Plan's funding basis is at least as conservative as the minimum funding standards.

We do not recommend funding the plan on the basis of the legal minimum. The minimum basis would allow a sort of "deficit financing"—a rate so low it might use up the credit balance and then be insufficient to keep up with the legal requirements thereafter. In other words, the minimum legal basis may not be good enough to provide financing through a stable rate.

While the legal funding requirement must always be met, the funding basis approved by the Trustees is more stable and generally more adequate to sustain the plan. In Section D the Plan's experience with regard to the funding policy established by the Trustees was discussed.

\* \* \*

[82]

## MARTIN E. SEGAL COMPANY

January 15, 1981

OREGON-WASHINGTON CARPENTERS-  
EMPLOYERS PENSION TRUST FUND*Actuarial Valuation Certificate*

This is to certify that we have prepared an actuarial valuation of the Plan as of July 1, 1980.

The certificate contains the following attached exhibits:

- I: Actuarial Cost for Year Beginning July 1, 1980
- II: Actuarial Assumptions and Funding Method
- III: Funding Standard Account
- IV: Changes in Actuarial Assumptions
- V: Summary of Plan Provisions

The valuation was based on the assumption that the Plan was qualified for the year and on information supplied by the auditor with respect to contributions and assets and by the Administrator with respect to the data required on employees and pensioners.

To the best of my knowledge, the information supplied in this actuarial valuation is complete and accurate (except as may be noted in Exhibit I) and in my opinion the assumptions used in the aggregate: (a) are reasonably related to the experience of the Plan and to reasonable expectations; and (b) represent my best estimate of anticipated experience under the Plan.

MIGUEL A. PADRO, A.S.A., M.A.A.A.  
ENROLLED ACTUARY NO. 147  
ASSOCIATE ACTUARY



[83]

**EXHIBIT I**  
**ACTUARIAL COST FOR YEAR BEGINNING**  
**JULY 1, 1980**

The valuation was made with respect to the following data for 9,962 members (including 5,293 vested or retired) as of the valuation date (to be reported on Form 5500, Line 7):

a.	2,358	pensioners
b.	88	beneficiaries
c.	857	inactive—vested employees
d.	1,990	active—fully vested employees
e.	4,669	active—non-vested employees

The cost factors as of the valuation date are:

Normal Cost*	.....	\$3,893,700
Accrued Liability:		
Active employees.....	\$57,260,900	
Inactive—vested employees .....	12,014,200	
Pensioners and Beneficiaries.....	35,539,800	
Total .....		104,814,900
Assets in the Fund** .....		56,896,400
Unfunded Accrued Liability .....		47,918,500
Present Value of Accrued Benefits:		
Pensioners and Beneficiaries.....	\$35,539,800	
Other vested participants .....	46,750,500	
All vested participants .....	\$82,290,300	
Non-vested participants .....	11,264,300	
Total .....		\$93,554,600

\*Includes interest adjustment for payments made at the end of each month and allowance for administrative expenses (\$225,000).

\*\*\$56,405,100 at Market Value

[84]

## EXHIBIT II

### ACTUARIAL ASSUMPTIONS AND FUNDING METHOD

Mortality rates: 1971 Group Annuity Table (with ages advanced one year).

Disability mortality before age 65: Assumed as age 65 in above Table.

Termination rates before retirement:

Age	Rate %			Total
	Death	Disability	Withdrawal	
20	.05	.05	7.90	8.00
25	.07	.05	7.68	7.80
30	.09	.05	7.18	7.32
35	.12	.06	6.23	6.41
40	.18	.09	5.08	5.35
45	.33	.18	3.82	4.33
50	.59	.40	2.22	3.21
55	.93	.85	.20	1.98
60	1.44	1.74	—	3.18
65	2.36	—	—	2.36
70	4.00	—	—	4.00

Retirement Age: For non-disability retirements: age 63, or completion of service requirement, if later.

Investment Return: 5.50% per annum.

Future Service Accrual Rate: 1.25 Benefit Unit per year.

Contribution Income: 1,475 hours per active employee

Administration expenses: \$225,000 per year.

Funding Method: Entry Age Normal Cost.

Valuation of Assets: At Adjusted Book Value\*.

\*Adjusted Book Value at beginning of year (increased by new money) written up/down by 20% of the difference between Market Value and this figure. The result must not be less than 80% nor greater than 120% of market value; otherwise, a further adjustment will be made.

[85]

**EXHIBIT III**  
**FUNDING STANDARD ACCOUNT FOR YEAR**  
**ENDING JUNE 30, 1981**

	<u>Charges</u>	<u>Credits</u>	<u>Accumulated Funding Balance</u>
1. Balance on July 1, 1980			\$8,750,700
2. Interest on Item (1)			481,300
3. Contributions for 1980-81			
4. Interest on Item (3)			
5. Normal Cost for 1980-81	\$3,893,700		
6. Interest on Item (5)	98,200		
7. Amortization payments	4,101,600	\$586,600	
8. Interest on Item (7)	103,400	14,800	
9. Total Items (1) through (8)	\$8,196,900		\$9,232,000
10. Net Addition to Funding Balance			
11. Total Funding Balance on 6/30/81			

The amortization payments (Item 7) were determined as follows:

				As of July 1, 1980		
Date Established	Original Period (in Years)	Type of Liability	Annual Payment	Years Remaining	Outstanding Balance	
Charges: 7/1/76	40	IL	\$3,117,600	36	\$49,644,100	
7/1/77	20	EL	74,800	17	833,000	
7/1/78	20	EL	22,800	18	262,800	
7/1/78	40	PA	438,600	38	7,105,000	
7/1/79	40	PA	191,300	39	3,123,200	
7/1/80	30	CA	256,500	30	3,820,900	
Total Amortization Charges			\$4,101,600		\$64,789,000	
Credits: 7/1/79	20	EG	\$ 102,900	19	\$ 1,224,200	
7/1/80	20	EG	117,300	20	1,436,900	
7/1/80	30	CA	3,200	30	47,900	
7/1/80	30	CA	363,200	30	5,410,800	
Total Amortization Credits			\$586,600		\$8,119,800	

**Notes:**

- (1) Contributions paid at the end of each month during the year.
- (2) Interest at 5.50% has been credited on all items (to the end of the year).
- (3) Items (5) and (7) are adjusted for payments made at end of each month.
- (4) Type of Liability: IL = Initial Liability; EL = Experience Loss; EG = Experience Gain; PA = Plan Amendment; CA = Change in Actuarial Assumptions.

[86]

## EXHIBIT IV

## CHANGES IN ACTUARIAL ASSUMPTIONS

1. *Interest Rate*: This assumption was [illegible] [probably "raised"] to 5.50% effective July 1, 1980.

2. *Future Service Accrual Rate*: The assumption was increased to 1.25 Benefit Units per year.

\* \* \*

[92]

**[EXHIBIT C TO AFFIDAVIT OF THOMAS M. TRIPLETT]  
The Pension Plan**

**[Illustration Omitted in Printing]**

**The Oregon-Washington  
Carpenters-Employers  
Pension Trust Fund**

**July 1, 1976  
(Revised January 25, 1978)**

[93]

**Oregon-Washington  
Carpenters-Employers  
Pension Trust Fund**

309 S. W. Sixth Avenue  
P.O. Box 3168  
Portland, Oregon 97208  
(503) 225-5650

**BOARD OF TRUSTEES**

**Employer Trustees**  
Rycken Paddock (Chairman)  
Carl M. Halvorson  
Henry Hannan  
V.A. Harding  
Frank B. Hastie, Jr.

**Employee Trustees**  
Harold G. Hansen (Co-Chairman)  
Roy W. Coles  
A. J. Darling  
Allen W. Rettmann  
Donald C. Staudenmier

**Co-Legal Counsel:**  
Paul T. Bailey  
John W. Hill

**Pension Consultant  
and Actuary:**  
Martin E. Segal Company

**Administrator:**  
United States National Bank of Oregon

**Revised Pension Plan  
for the  
Oregon-Washington  
Carpenters-Employers  
Pension Trust Fund**

**As revised July 1, 1976 with second revision (including  
amendments #1 and #2).**

This revised Pension Plan replaces the Prior Plan and is applicable only to pensions or other benefits which commence on and after July 1, 1976, as well as deferred vested benefits of former employees whose participation terminated prior to July 1, 1976 are to be determined under the Prior Plan.

## ARTICLE 1. DEFINITIONS

Unless the context or subject matter otherwise requires, the following conditions shall govern in the Plan:

Section 1.01. "Building and Construction Industry" means all building and home construction and all heavy, highway and engineering construction and work of the type covered under the Collective Bargaining Agreement or work for the Union or a Local Union.

Section 1.02. "Collective Bargaining Agreement" means:

- a. The agreement by and between Employers and Union dated June 19, 1962.
- b. Any other collective bargaining agreement in the construction or closely related industry between Union, or any of its affiliated Local Unions, and any Employer, Signatory Association or Individual Employer which provides for the making of employer contributions to the Fund.
- c. Any extensions, amendments, modifications or renewal of any of the above described agreements, or any substitute or successor agreements to them which provide for the making of employer contributions to this Fund.

Section 1.03. "Contribution" means the payment made or to be made to the Fund by any Individual Employer under the provisions of the Collective Bargaining Agreement. The term "Contribution" shall also include any payment made or to be made on behalf of any employee-member of Union or a Local Union pursuant to regulations adopted by the Board of Trustees.

The term "Contribution" also means any payment made on behalf of an employee in a supervisory capacity by an Individual Employer pursuant to regulations adopted by the Trustees. The term "Contribution" also means any pay-



ment made on behalf of an employee of any jointly administered trust fund established pursuant to the Collective Bargaining Agreement in accordance with regulations adopted by the Trustees.

Section 1.04. Prior to July 1, 1976, "Contributory Hours" means compensable hours of Covered Employment for which Contributions are [94] made to the Fund. After June 30, 1976, "Contributory Hours" means compensable hours of Covered Employment for which Contributions are made or are required to be made to the Fund.

Section 1.05. "Covered Employment" means work as an Employee as defined in Section 1.06.

"Continuous Non-Covered Employment" means employment for a Contributing Employer after July 1, 1976 in a job not covered by this Plan which is continuous with a Participant's Covered Employment with the same Contributing Employer. A period of Non-Covered Employment will be considered to be continuous with Covered Employment only if there is no quit, discharge, or other termination of employment between the period of Covered and Non-Covered Employment.

Section 1.06. "Employee" means any employee of an Individual Employer who performs one or more hours of work of the type covered by the Collective Bargaining Agreement and any employee-member of Union or a Local Union on whose behalf Contributions are made to the Fund pursuant to regulations adopted by the Board of Trustees. The term "Employee" also means an employee employed by an Individual Employer in a supervisory capacity who had earned Credited Service under this Pension Plan at any time prior to his employment in a supervisory capacity, pursuant to regulations adopted by the Trustees. The term "Employee" also means employees of any jointly administered trust fund established pursuant to the Collective Bargaining Agreement in accordance with regulations adopted by the Trustees.

The term "Employee" does not include any self-employed person, whether a sole proprietor or a partner.

Section 1.07. "Employers" means the following associations which are parties to the Trust Agreement: Oregon-Columbia Chapter, the Associated General Contractors of America, Inc.; Eugene Contractors Association; Associated Interior Contractors of Oregon and Southwest Washington, Inc.; Home Builders Association of Metropolitan Portland (formerly known as Portland Home Builders Association); Southwest Washington Contractors Association, Inc. (formerly known as Vancouver Contractors Association).

An Employer shall not be deemed a Contributing Employer simply because it is part of a controlled group of corporations (within the meaning of Section 1563(a) of the Internal Revenue Code, determined without regard to Section 1563(a)(4) and (e)(3)(C), or of [sic] a trade or business under common control within the meaning of Section 414(c) of the Internal Revenue Code), some other part of which is a Contributing Employer.

Section 1.08. "Hour of Service" means each hour for which an Employee is directly or indirectly paid or entitled to payment by a Contributing Employer after July 1, 1962 for performance of duties during a Plan Credit Year, including hours for which back pay may be awarded or agreed to by a Contributing Employer, and for each hour during a Plan Credit Year for which the Employee is directly or indirectly paid or entitled to payment on account of a period of time during which no duties are performed (irrespective of whether the employment relationship has terminated) because of vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty or leave of absence. Notwithstanding the foregoing, no more than 501 hours of service will be credited to an Employee on account of any single continuous period during which the Employee performs no duties (whether or not such period occurs in a single Plan Credit Year). (Two periods of non-work time shall be deemed continuous if they are compensated for the same reason and are not separated by at least 90 days). An Employee will not receive hour-of-service credit under the foregoing if the payment is made or due under a plan maintained solely for the purpose of complying with applicable workman's compensation or unemployment compensation

or disability insurance laws, or if the payment solely reimburses an Employee for medical or medically related expenses incurred by the Employee. Irrespective of the foregoing, an Employee is not required to be credited on account of a period during which no duties are performed with a number of hours of service which is greater than the number of hours regularly scheduled for the performance of duties during such period.

Section 1.09. "Individual Employer" or "Contributing Employer" means an (1) employer who is required by the Collective Bargaining Agreement to make Contributions to the Fund, or who does in fact make one or more Contributions to the Fund, (2) the Union and Local Unions which make Contributions to the Fund on behalf of employee-members pursuant to regulations adopted by the Board of Trustees, and (3) a jointly administered trust fund established pursuant to the Collective Bargaining Agreement which makes Contributions to the Fund on behalf of its employees in accordance with regulations adopted by the Trustees.

Section 1.10. "Normal Retirement Age" means age 65 or, if later, the age of the Participant on the tenth anniversary of his participation. Participation before a Permanent Break in Service shall not be counted.

Section 1.11. "Participant" means a Pensioner, Beneficiary, or an Employee who meets the requirements for participation in the Plan as set forth in Article 2, or a former Employee who has attained Vested Status under this Plan. A Beneficiary is a person (other than an Employee or a Pensioner) who is receiving benefits under this Plan because of his or her designation for such benefits by a Pensioner or Participant. A "Vested Participant" is an Employee who qualifies for a Vested Pension in accordance with the provisions of Section 3.13.

Section 1.12. "Pensioner" means a person to whom a pension is being paid under this plan or to whom a pension plan would be paid but for the time required for administrative processing.

Section 1.13. "Plan" means this Pension Plan and any modification, amendment, extension or renewal thereof.

Section 1.14. "Plan Credit Year" means the twelve-month period from July 1 of any year through June 30 of the following year. For purposes of ERISA regulations the Plan Credit Year shall serve as the vesting computation period and benefit accrual computation period and beginning with the Plan Credit Year during the initial period of employment, the computation period for eligibility to participate in the Plan.

Section 1.15. "Plan Year" means the Trust Fund's fiscal year, the twelve-month period from July 1 of any year through June 30 of the following year.

Section 1.16. "Prior Plan" means the Pension Plan adopted July 1, 1976 and all amendments or modifications thereto effective prior to July 1, 1976.

[95] Section 1.17. "Signatory Association" means any employer organization, other than Employers, which signs the Trust Agreement on behalf of its members or executes on behalf of such members a written acceptance of the agreement to be bound by the terms of the Trust Agreement.

Section 1.18. "Trusts," "Trust Fund" or "Fund" means the trust fund created and established by the Trust Agreement, including any insurance policies, monies, investments and other assets held under the Trust Agreement.

Section 1.19. "Trust Agreement" means the Trust Agreement dated December 19, 1962, establishing the Oregon-Washington Carpenters-Employers Pension Trust Fund and any modification, amendment, extension or renewal thereof.

Section 1.20. "Trustees" or "Board of Trustees" or "Board" means the Board of Trustees established by the Trust Agreement.

Section 1.21. "Union" means the following union entities which are parties to the Trust Agreement: Oregon State Council of Carpenters (affiliated with United Brotherhood of Carpenters & Joiners of America). Portland & Vicinity District Council of Carpenters, Southwest Washington District Council of Carpenters, UB of C & J of A, Piledrivers, Bridge, Dock & Wharf Builders, UB of C & J of A, and their respective successors and assigns.

Section 1.22. "Year of Participation" means, for purposes of compliance with Regulation 2530 of the Department of Labor, a Plan Credit Year after June 30, 1976 in which a Participant has completed 2,000 hours of service in Covered Employment.

Section 1.23. Other terms are specifically defined as follows:

<b>Term</b>	<b>Section(s)</b>
a. ERISA .....	2.01
b. Regular Pension .....	3.02 and 3.03
c. Early Retirement Pension .....	3.04 and 3.05
c. Disability Pension .....	3.06 and 3.07
e. Deferred Vested Pension .....	3.13 and 3.14
f. Pro Rata Pension .....	4.08 and 4.09
g. Partial Pension .....	5.05 and 5.08
h. Years of Credited Service	
Credited Past Service .....	6.02
Credited Future Service .....	6.03
i. Benefit Units .....	6.04
j. Break in Service	
(One-Year Break in Service, Permanent Break in Service) .....	6.05
k. Separation from Covered Employment .	6.06
l. Husband-and-Wife Pension .....	7.01
m. Effective Date of Pension .....	9.05
n. Retired or Retirement .....	9.08

\* \* \*

[104] Section 9.11. Nonforfeitability and Vested Status.

- a. The Employee Retirement Income Security Act requires that certain of the benefits under this Plan be nonforfeitable.
- b. A Participant acquires a nonforfeitable right to a Regular Pension or Vested Pension at Normal Retirement Age after completion of ten Years of Service ("Years of Service" as used in this section means those years of service required to be credited in accordance with Section 411 of the Internal Revenue Code and Section 203 of ERISA and as further defined by the applicable regulations.) Periods of service and breaks in service are de-

fined for that purpose under this Plan on the basis of all hours of service.

- c. ERISA also provides certain limitations on any plan amendment that may change the plan's vesting schedule. In accordance with those legal limitations, no amendment of this plan may take away a Participant's nonforfeitable right to a Regular Pension at Normal Retirement Age, if he has already earned it at the time of the amendment. If an amendment changes the schedule on the basis of which a Participant acquires such a right, any Participant who has at least five Years of Service at the time the amendment is adopted or effective (which-ever is later) will achieve such a nonforfeitable right on the basis of the pre-amendment schedule which results in the earliest nonforfeitable right.

While this Plan provides Regular Pensions, Vested Pensions, Early Retirement Pensions, Disability Pensions, Pro-Rata Pensions and Partial Pensions on the basis of requirements that may be met by some Participants who have not completed 10 Years of Service, such eligibility rules represent provisions of the Plan above and beyond those which are required by law to be nonforfeitable.

\* \* \*

#### [105] **ARTICLE 10. MISCELLANEOUS**

**Section 10.01. Non-Reversion.** It is expressly understood that in no event shall any of the corpus or assets of the Trust Fund revert to the employers or be subject to any claims of any kind or nature by the Employers, except for the return of an erroneous contribution within the limits prescribed by law.

**Section 10.02. Gender.** Wherever any words are used in this Pension Plan in the masculine gender, they should be construed as though they were also in the feminine gender in all situations where they would so apply; wherever any words are used in this Pension Plan in the singular form, they should be construed as though they were also in the plural form in all situations where they would so apply, and vice versa.



Section 10.03. Limitation of Liability. This Pension Plan has been established on the basis of an actuarial calculation which has established, to the extent possible, that the contributions will, if continued, be sufficient to maintain the plan on a permanent basis, fulfilling the funding requirements of ERISA. Except for liabilities which may result from provisions of ERISA, nothing in this plan shall be construed to impose any obligation to contribute beyond the obligation of the Employer to make contributions as stipulated in its collective bargaining agreement with the Union.

There shall be no liability upon the Trustees individually, or collectively, or upon the Union to provide the benefits established by this Pension Plan, if the Pension Trust does not have assets to make such payments.

Section 10.04. Addition of New Groups of Employees. The Trustees shall review the relevant actuarial data with respect to any group of employees added to the coverage of this Trust Fund. If the Trustees conclude that modification of previously adopted funding assumptions or changes in the amounts of pension benefits hereunder would result from the inclusion of such group, the appropriate provisions of the Pension Plan shall be modified with respect to the group involved so that the Trust will not be adversely affected by the inclusion of such group for coverage hereunder.

Section 10.05. Terminated Employer. If an Employer terminates its participation in the Trust with respect to a bargaining unit, the Trustees are empowered to reduce or cancel any obligation of the Trust with respect to that part of any pension for which a person was made eligible because of employment in such bargaining unit prior to the contribution date with respect to that unit. Neither the Board, the remaining Contributing Employers, nor the Union shall be obliged to make such payments.

C \* \* \*



[112] OREGON-WASHINGTON CARPENTERS-  
EMPLOYERS PENSION TRUST FUND  
REVISED PENSION PLAN  
(Amended and Restated Effective July 1, 1976)

**SIXTH AMENDMENT**

This amendment is made and entered into effective April 29, 1980, by the Board of Trustees of the Oregon-Washington Carpenters-Employers Pension Trust Fund ("Trust Fund").

WHEREAS the Board of Trustees first established the Trust Fund Pension Plan effective December 19, 1962, and

WHEREAS the Pension Plan was last amended and restated effective July 1, 1976, and was last amended effective December 1, 1980, and

WHEREAS the Board of Trustees desires to further amend the Plan pursuant to Section 11.01 thereof to adopt certain optional rules provided in the Multiemployer Pension Plan Amendments Act of 1980,

NOW, THEREFORE, the Oregon-Washington Carpenters-Employers Pension Trust Fund Revised Pension Plan is hereby amended effective April 29, 1980, to add a new Article 12 thereto as follows:

**ARTICLE 12**

**EMPLOYER WITHDRAWAL LIABILITY**

Section 12.01. Compliance with Multiemployer Act. The following provisions are designed to comply with those sections of the Multiemployer Pension Plan Amendments Act of 1980 ("Multiemployer Act") and the regulations thereunder which require that certain optional provisions of the Multiemployer Act be set forth in the Plan. To the extent that an optional provision is not adopted, the presumptive provisions of the Multiemployer Act shall apply.

Section 12.02. Denominator Exclusion. Only the contributions of "significant withdrawn employers" shall be excluded from the denominators of withdrawal liability fractions described in ERISA Section 4211(b) or (c). A "significant withdrawn Employer" is:

[113] a. An Employer to whom the Plan has sent a notice of withdrawal liability under ERISA Section 4219; or

b. A withdrawn Employer that in any Plan Year used to determine the denominator of a withdrawal liability fraction contributed at least \$250,000 or, if less, 1 percent of all contributions made by Employers for that Plan Year; or

c. A group of Employers if they withdraw in a "concerted withdrawal." A "concerted withdrawal" means a discontinuance of contributions to the Plan during a single Plan Year:

(1) by an employer association;

(2) by all or substantially all of the Employers covered by a single collective bargaining agreement; or

(3) by all or substantially all of the Employers covered by agreements with a single labor organization.

Section 12.03. The sum of all contributions made and the total amount contributed by Employers for a Plan Year include contributions received during the first month of the following Plan Year and also include contributions received during the second month of the following Plan Year that relate to Plan Years prior to the Plan Year in which made.

Section 12.04. Annual Withdrawal Liability Payment. In calculating the amount of each annual withdrawal liability payment for the July 1, 1979, through June 30, 1980, Plan Year, the average annual number of withdrawing Employer contribution base units and the highest contribution rate at which such Employer had an obligation to contribute shall be determined based on a five Plan Year period. That period shall be increased by one year for each succeeding Plan Year until the number ten is reached.

**MEMORANDUM OF POINTS AND AUTHORITIES IN  
SUPPORT OF DEFENDANT PENSION BENEFIT  
GUARANTY CORPORATION'S CROSS-MOTION FOR  
SUMMARY JUDGMENT AND IN OPPOSITION TO  
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

[Caption Omitted in Printing]

**STATEMENT OF PROCEEDINGS**

This is an action for a declaratory judgment that certain provisions of the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208, *et seq.* (September 26, [2] 1980) (the "Multiemployer Act"), 29 U.S.C.A. § 1001, *et seq.* (Supp. 1981), are unconstitutional and unenforceable, and for a permanent injunction against enforcement of those provisions.

On September 29, 1981, R.A. Gray & Co. ("Gray") filed its Complaint for Declaratory Judgment and Other Relief, its Application for Preliminary Injunction and for Order to Show Cause, and its Points and Authorities in Support thereof. On October 23, 1981, Gray served its Memorandum in Support of Temporary Restraining Order and Preliminary Injunction (hereinafter, "Gray First Brief") and the Affidavit of John R. Bentley (hereinafter referred to as "Bentley Aff."), Gray's Secretary-Treasurer. The same day, defendant Oregon-Washington Carpenters-Employers Pension Trust Fund (the "Trust") filed its Memorandum in Opposition to Plaintiff's Application for Injunctive Relief and its Motion for Summary Judgment, with a supporting memorandum and an affidavit of Dolores Taylor ("Taylor Aff."), fund manager for the Trust.

On October 30, 1981, defendant Pension Benefit Guaranty Corporation (the "PBGC") served its Statement of Reasons and Authorities in Opposition to Gray's Motions for Temporary Restraining Order and Preliminary Injunction. On November 6, 1981, Gray served its Motion for Summary Judgment and on November 10 served its Reply Memorandum on Motions for Preliminary Relief and Memorandum in Support of Motion for Summary Judgment (hereinafter, "Gray Second Brief"). On November 16, 1981, Gray's attorney [3] in this action executed an affidavit (hereinafter

"Triplett Aff."). Attached to the Triplett Aff. as exhibits are copies of two actuarial valuations of the Trust, a copy of the Plan, including amendments Three through Six to the Plan, and a copy of the Revised Sixth Amendment to the Trust Agreement for the Trust, made on September 13, 1979. (The Triplett Aff. was actually filed and served on April 6, 1982.)

At the conclusion of the hearing on November 16, 1981, the court entered an order denying Gray's motion for preliminary injunction, and advised the parties of a forthcoming opinion. On November 19, Gray served a motion for reconsideration of this order, which was denied on November 20, 1981. On December 1, 1981, the court issued its opinion and order denying the motion for preliminary injunction.

In its December 1 opinion, the court noted that at least one issue in the action—whether Gray had withdrawn from the pension plan involved here—was "particularly appropriate for resolution through the arbitration process" required by the Multiemployer Act. Slip Op. at 7 (D. Ore., December 1, 1981). Accordingly, the court concluded that the motions for summary judgment were not ripe for decision at that time. If Gray did not request arbitration, the motions for summary judgment would be ruled on after additional briefing of the constitutional issues. *Id.* To give Gray time to consider its options, the court set the next status hearing for February 16, [4] 1982. PBGC's answer to the complaint was filed on December 4, 1981; the Trust has not filed an answer.

At the February 16, 1982 status hearing, Gray's counsel agreed that he was "going to accept the trustees' findings," with regard to the fact of Gray's withdrawal, the date of the withdrawal, and "the appropriateness of the action of the actuary in determining the total withdrawal liability and the allocations of that liability to my client." Exhibit 1 (Transcript of Hearing in Chambers, February 16, 1982) at 84. Further, Gray's counsel stated "[i]n any event, it appears to me that there is therefore no need to arbitrate because the fact findings, we are prepared to adopt." *Id.* at 84-85. In response to an inquiry from counsel for the Trust regarding the "procedural" aspects of arbitration, Gray's

counsel stated "we are not at this point questioning the arbitration process, nor are we questioning the process by which fact determinations were made, even though they might have been an unconstitutional process. . . ." *Id.* at 86.

At the conclusion of the status hearing, the court scheduled the filing of briefs on the motions for summary judgment. The PBGC now files the instant memorandum with attached exhibits and its cross-motion, seeking summary judgment in its favor and against the plaintiff, on the grounds that the Multiemployer Act is constitutional in all challenged respects.

#### [5] STATEMENT OF FACTS

The undisputed, material facts, *see* Rule 56(c), Fed. R. Civ. P., are set forth on the following pages 5 through 13.

#### The parties.

Defendant Trust is a trust organized under the laws of the United States and the state of Oregon. The Trust was established effective July 1, 1962 pursuant to a Trust Agreement dated December 19, 1962, as amended from time to time. (A copy of the full Amended Trust Agreement, made August 1, 1968, is attached hereto as Exhibit 2, and is incorporated by reference herein. A copy of the September 13, 1979 amendment to the Trust Agreement has been filed in this action as Triplett Aff., pp. 114-19, and is incorporated by reference herein.) The Trust is administered pursuant to the Revised Pension Plan for the Oregon-Washington Carpenters-Employers Pension Trust Fund (the "Plan").

The Trust Agreement provides in relevant part as follows:

The liability of any Individual Employer to the Fund, or with respect to the Plan, shall be limited to the contributions required by the Collective Bargaining Agreement or Trust Agreement . . . . The Individual Employer shall not be required to make any further contributions to the cost of operation of the Fund or of the Plan, except as herein elsewhere provided. *This section shall only apply to the extent permitted by law.*

[Trust Agreement, Art. II, § 6 (Exhibit 2 at 95) (emphasis added).]

[6] Section 7 of the Trust Agreement contains a similar clause: "*To the extent permitted by law, [none] of the Employers, any Signatory Association [nor] any Individual Employer . . . shall be liable or responsible for any debts, liabilities or obligations of the Fund or of the Trustees.*" (Exhibit 2 at 95-96 (emphasis added).)

The Plan was revised July 1, 1976 and has been amended six times since then. (A copy of the revised Plan and its amendments has been filed in this action as Triplett Aff., pp. 92-106, and is incorporated by reference herein.) The Plan is a multiemployer defined benefit pension plan within the meaning of Section 4001(a)(3) of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by the Multiemployer Act, 29 U.S.C.A. § 1301(a)(3) (Supp. 1981). Section 10.03 of the Plan provides in pertinent part as follows:

Section 10.03. Limitation of Liability. This pension plan has been established on the basis of an actuarial calculation which has established, to the extent possible, that the contributions will, if continued, be sufficient to maintain the plan on a permanent basis, fulfilling the funding requirements of ERISA. *Except for liabilities which may result from provisions of ERISA*, nothing contained in this plan shall be construed to impose any obligation to contribute beyond the obligation of the Employer to make contributions as stipulated in its collective bargaining agreement with the Union. . . . [Triplett Aff. at 105 (emphasis added).]

The Plan primarily covers employees in the building and construction industry. See Trust Multiemployer Act "Compliance [7] Policy, July 28, 1981" (attached hereto as Exhibit 3 and incorporated by reference herein) at 107, 111 (hereinafter referred to as "Compliance Policy"). Substantially all of the employees with respect to whom Gray had an obligation to contribute under the Plan were performing work in the building and construction industry, and the Plan primarily covers employees in that industry. Exhibit 3 at 107. The Plan is therefore a building and construction industry



plan within the meaning of Section 4203(b) of ERISA, 29 U.S.C.A. § 1383(b).

The trustees of the Trust are the plan sponsor of the Plan within the meaning of Section 4001(a)(10) of ERISA, 29 U.S.C.A. § 1301(a)(10) (Supp. 1981). Pursuant to Article III, Section 1 of the Trust Agreement, the Trust is administered by the Board of Trustees consisting of five trustees representing employers and five trustees representing employees. (Exhibit 2 at 96.)

Gray is an employer within the meaning of Title IV of ERISA. Pursuant to successive collective bargaining agreements, in particular the July 23, 1968 Short Form Agreement with the Oregon State Council of Carpenters (the "State Union") (Bentley Aff. at 5) and Article XV of the 1975-1980 Carpenters Master Labor Agreement (Bentley Aff. at 13), Gray made contributions to the Trust to finance the pension benefits provided by the Plan. (Copies of the July 23, 1968 Short Form Agreement and the 1975-1980 Carpenters Master Labor Agreement have been filed in this action as Bentley Aff. at 5 and Bentley Aff. [8] at 6-19, respectively and are incorporated by reference herein.) The Carpenters Master Labor Agreement was executed by the Oregon-Columbia Chapter, Associated General Contractors of America, Inc. (the "Employer Association") and the Oregon State and Southwest Washington District Councils of the United Brotherhood of Carpenters and Joiners of America (the "National Union"). Gray's employees were represented for collective bargaining purposes by several Union locals which are members of the Portland and Vicinity District Council of Carpenters (the "Local").

Defendant PBGC, created by Section 4002(a) of ERISA, 29 U.S.C. § 1302(a) (1976), is a United States corporation responsible for the administration and enforcement of Title IV of ERISA *as amended by the Multiemployer Act*, 29 U.S.C.A. §§ 1301-1461, 1303(e)(1) (Supp. 1981).

**The employer withdraws from the Plan.**

On or about February 14, 1980, Gray notified the State Union that, effective June 1, 1980, Gray was terminating



its collective bargaining agreement with the National Union. Gray and the Local filed unfair labor practice charges against each other with the National Labor Relations Board as a result of events occurring in connection with Gray's termination of the labor contract. The Local charged Gray with an unfair labor practice in distributing letters to its employees suggesting they could reduce their involvement with the Local. Thereafter, [9] the Local began picketing Gray in order to obtain recognition and to publicize the unfair labor practice charges. The recognitional picketing continued through at least November 1981. Gray charged that the Local unlawfully fined and disciplined some union members for allegedly crossing the picket line established at Gray's work sites. The NLRB has declined to issue complaints in response to Gray's charges. (Copies of the unfair labor practice charges filed by Gray against the Local, and associated documents, are attached hereto as Exhibit 4, pp. 165-85, and incorporated by reference herein.)<sup>1</sup>

In addition to filing countercharges based on alleged unfair labor practices, Gray and the State Union corresponded about Gray's proposals for a labor agreement. Exhibit 4 at 139, 140, 154, 156, 160-67. In particular, Gray proposed changes in pension and vacation benefits, Exhibit 4 at 162, and a unilateral wage increase, *id.* at 166, 167. Gray's negotiations with a related union had reached an "impasse," *id.* at 166, regarding "subcontractor and union security clauses," *id.* at 140, 166. Similar obstacles to agreement between Gray and the State Union arose, *id.* at 166. Consequently, Gray implemented its unilateral proposals, albeit "without prejudice to such agreement as future negotiations may produce." [10] Exhibit 4 at 162. Following the termination of its collective bargaining agreement and the break-down in negotiations, Gray's work force became essentially non-union. Exhibit 4 at 139, 153, 154, 165.

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<sup>1</sup> These charges and related documents were reviewed by the Board of Trustees, and form part of the record of the Trustees' "Decision on Review," Exhibit 4, pp. 137-59, discussed *infra* at pp. 11-12.

**The Plan sponsor assesses liability.**

In a letter dated July 24, 1981, the trustees of the Trust caused the Trust's fund manager to notify Gray, pursuant to Sections 4202 and 4219(b)(1) of ERISA *as amended*, 29 U.S.C.A. §§ 1382, 1399(b)(1), that Gray had withdrawn from the Plan and had incurred a withdrawal liability of \$201,359. Taylor Aff.; PBGC's Statement of Reasons and Authorities in Opposition to Motions for Temporary Restraining Order and Preliminary Injunction (hereinafter referred to as "PBGC Preliminary Brief") at Exhibit 1. The July 24, 1981 notice of liability stated that Gray ceased to have an obligation to contribute to the Trust on or about June 1, 1980, and consequently withdrew from the Plan in a complete withdrawal as defined in Section 4203 of ERISA, 29 U.S.C.A. § 1383. The notice also set forth a schedule of quarterly payments of withdrawal liability and demanded payment in accordance with the schedule.

In an August 6, 1981 letter, Gray's counsel raised several questions concerning Plan rules and amendments and requested copies of actuarial valuations of the Trust. PBGC Preliminary Brief at Exhibit 2. By letter dated September 3, 1981, counsel for the Trust supplied some of the documents and information [11] requested, and made the actuarial valuations available for inspection. PBGC Preliminary Brief at Exhibit 3. By letter dated September 16, the Trust's counsel provided copies of the actuarial valuations to Gray. *Id.*, Exhibit 5. (The actuarial valuations have been filed in this action as Exhibits A and B to the Triplett Aff.)

Subsequently, in a letter dated September 25, 1981, the Trust informed Gray that it was delinquent in its quarterly payment of withdrawal liability and that it would be in default if it did not cure its failure to pay within 60 days. *Id.*, Exhibit 6.

**The employer requests review.**

Finally, in a letter dated October 12, approximately two weeks after filing Gray's complaint in this action, counsel for Gray formally requested review of the Plan sponsor's determinations pursuant to Section 4219(b)(2)(A) of ERISA, 29 U.S.C.A. § 1399(b)(2)(A). This request for re-

view preserved Gray's opportunity to arbitrate its dispute with the Plan. PBGC Preliminary Brief at Exhibit 7. Subsequently, the Board of Trustees of the Trust issued its "Decision on Review" concerning Gray's withdrawal liability, pursuant to Section 4219(b)(2)(B). (A copy of the "Decision on Review," along with the Trustees' "Abstract of Record," is attached hereto as Exhibit 4, pp. 137-59, and incorporated by reference herein.)

[12] In its Decision on Review, the Board of Trustees made several fact determinations, none of which are disputed by any party for the purposes of the instant summary judgment proceeding. Exhibit 1 at 84, 84-85. The following are among the most important fact-findings by the Plan sponsor:

1. "Gray did not withdraw from the ... Plan solely because of a suspension of contributions during a 'labor dispute,'" within the meaning of Section 4218(2) of ERISA, 29 U.S.C.A. § 1398(2) (Exhibit 4 at 137);

2. the Plan sponsor selected a proper method for allocating unfunded vested benefits to Gray (Exhibit 4 at 141);

3. the schedule of payments offered to Gray is appropriate (Exhibit 4 at 143);

4. the actuarial determination of the amount of the Plan's unfunded vested benefits is accurate (Exhibit 4 at 147);

5. a transfer of assets and liabilities from the Plan to the single-employer plan established by Gray may be appropriate but should be delayed pending issuance of PBGC regulations on that topic (Exhibit 4 at 149); and,

6. the date of Gray's withdrawal was June 1, 1980, and the cessation of Gray's obligation to contribute to the Trust was permanent by no later than June 20, 1980 (Exhibit 4 at 152).

Following receipt of the Plan sponsor's decision, Gray had a 60-day period under the statute in which it could have [13] initiated arbitration of its disputes with the Plan sponsor. Section 4221(a)(1)(A) of ERISA, 29 U.S.C.A. § 1401(a)(1)(A). Gray, however, waived its right to seek arbitration. Exhibit 1 at 84-85.

Gray has not paid any of its withdrawal liability and continues to refuse to pay on the schedule established by the trustees.

\* \* \*

[93]

[Exhibit Two to PBGC Memorandum of  
Points and Authorities]

**OREGON-WASHINGTON  
CARPENTER-EMPLOYERS  
PENSION TRUST FUND**

**BOARD OF TRUSTEES**

*Employer Trustees*

Carl M. Halvorson  
Henry Hannan  
V. A. Harding  
Frank B. Hastie, Jr.  
Rychen Paddock

*Employee Trustees*

Roy Coles  
A. J. Darling  
Harold Hansen  
Allen W. Rettmann  
Donald C. Staudenmier

**CO-LEGAL COUNSEL**

Bailey, Doblle & Bruun  
Miller, Anderson, Nash,  
Yerke & Wiener

**CONSULTANTS AND ACTUARIES**

Martin E. Segal Company

**AUDITOR**

Touche Ross & Co.

**FUND MANAGER**

United States National Bank of Oregon  
P.O. Box 3168, Portland, Oregon 97208

## TRUST AGREEMENT INDEX

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**TRUST AGREEMENT  
OREGON-WASHINGTON CARPENTERS-  
EMPLOYERS PENSION  
TRUST FUND**

This amended Trust Agreement Last Made and Entered into as of the 1st day of August, 1968, and last amended July 1, 1976, by and between OREGON-COLUMBIA CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., EUGENE CONTRACTORS ASSOCIATION, ASSOCIATED INTERIOR CONTRACTORS OF OREGON AND SOUTHWEST WASHINGTON, INC., HOMEBUILDERS ASSOCIATION OF METROPOLITAN PORTLAND, formerly known as PORTLAND HOME BUILDERS ASSOCIATION, SOUTHWEST WASHINGTON CONTRACTORS ASSOCIATION, INC. formerly known as VANCOUVER CONTRACTORS ASSOCIATION, and certain contractor associations of Oregon and Southwest Washington, which may become signatory hereto, acting for and on behalf of their members and hereinafter referred to as "Employers", and the OREGON STATE COUNCIL OF CARPENTERS, PORTLAND & VICINITY DISTRICT COUNCIL OF CARPENTERS, SOUTHWEST WASHINGTON DISTRICT COUNCIL OF CARPENTERS, PILEDRIVERS, BRIDGE, DOCK AND WHARF BUILDERS of the UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA who are signatories to the hereinafter mentioned Collective Bargaining Agreement, acting for and on behalf of the local unions listed therein, hereinafter referred to as "Union", recites and provides as follows:

**WITNESSETH:**

**WHEREAS**, Portland Chapter, The Associated General Contractors of America, Inc., (Heavy and Highway Division), and Portland Chapter, The Associated General Contractors of America, Inc., (Building Division), Portland Home Builders Association, Vancouver Contractors Association, Longview-Kelso Contractors Association, Eugene Contractors Association, Willamette General Contractors Association, Lower Columbia Contractors Association, Interior Builders Association and certain contractor associa-



tions of Oregon and Southwest Washington, which may become signatory hereto, acting for and on behalf of their members and the Oregon State Council of Carpenters (affiliated with United Brotherhood of Carpenters & Joiners of America), Portland & Vicinity District Council of Carpenters and Southwest Washington District Council of Carpenters UB of C & J of A, who are signatories to the hereinafter mentioned Collective Bargaining Agreement, acting for and on behalf of the local unions listed therein and Local No. 1342 of the Southwest Washington Council of Carpenters, UB of C & J of A, and Local No. 2416, Local No. 2419, Local No. 1036, Local No. 1223 and Local No. 1879 of the Piledrivers, Bridge, Dock & Wharf Builders, UB of C & J of A, who are also signatories to the hereinafter mentioned Collective Bargaining Agreement, entered into an Agreement on the 19th day of December, 1962, and

WHEREAS, Lower Columbia Contractors Association, Willamette General Contractors Association, Longview-Kelso Contractors Association have been dissolved, and

WHEREAS, Oregon-Columbia Chapter, The Associated General Contractors of America, Inc., has become the successor to Portland Chapter, The Associated General Contractors of America, Inc. (Heavy and Highway Division), and Portland Chapter, The Associated General Contractors of America, Inc. (Building Division) and

WHEREAS, Interior Builders Association has ceased to act as a collective bargaining agent for any of its members in dealing with Union and has notified all parties to the Trust Agreement that it withdraws as a signatory party hereto, and

WHEREAS, Acoustical Contractors Association of Oregon, Inc., has changed its name as a result of merger to Associated Interior Contractors of Oregon and Southwest Washington, Inc., and

WHEREAS, Portland Home Builders Association has changed its name to Home Builders Association of Metropolitan Portland, and

WHEREAS, Vancouver Contractors Association has changed its name to Southwest Washington Contractors Association, Inc., and

WHEREAS, the parties hereto amended the original Trust Agreement as of January 1, 1971, January 1, 1975, March 25, 1975, and July 1, 1976, so as to read as set forth herein:

This Trust agreement, made and entered into as of the 19th day of December, 1962, by and between OREGON-COLUMBIA CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.; LONGVIEW-KELSO CONTRACTORS ASSOCIATION; EUGENE CONTRACTORS ASSOCIATION; PORTLAND HOME BUILDERS ASSOCIATION; VANCOUVER CONTRACTORS ASSOCIATION; INTERIOR BUILDERS ASSOCIATION and certain contractor associations of Oregon and Southwest Washington; which may become signatory hereto acting for and on behalf of their members and hereinafter referred to as "Employers", and the OREGON STATE COUNCIL OF CARPENTERS; PORTLAND & VICINITY DISTRICT COUNCIL OF CARPENTERS; SOUTHWEST WASHINGTON DISTRICT COUNCIL OF CARPENTERS; PILEDRIVERS, BRIDGE, DOCK AND WHARF BUILDERS of the UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA who are signatories to the hereinafter mentioned Collective Bargaining Agreement, acting for and on behalf of the local unions listed therein, hereinafter referred to as "Union", recites and provides as follows:

(1) The above-mentioned parties are parties to a Collective Bargaining Agreement which provides for employer contributions of a certain sum per hour for each compensable hour worked by employees under such agreement to a trust fund for the purpose of providing a Pension Plan for all eligible employees covered by such Agreement.

(2) The parties have agreed that such contributions shall be payable to and be deposited in the Trust Fund created and established by this Trust Agreement.

(3) The purpose of this Trust Agreement is to provide for the establishment of such Trust Fund and for the maintenance of such Plan in the manner hereinafter set forth.

NOW, THEREFORE, This Agreement Witnesseth:

That in consideration of the premises, in order to create said trust to be known as the Oregon-Washington Carpenters-Employers Pension Trust Fund, it is mutually understood and agreed as follows:

## **ARTICLE I**

### **Definitions**

Unless the context or subject matter otherwise requires, the following definitions shall govern in this Trust Agreement:

#### **Section 1. Collective Bargaining Agreement:**

a. The agreement by and between Employers and Union dated June 19, 1962.

b. Any other collective bargaining agreement in the construction or closely related industry between Union, or any of its affiliated Local Unions, and any Employer, Signatory Association or Individual Employer which provides for the making of employer contributions to the Fund.

c. Any extensions, amendments, modifications, supplementations or renewals of any of the above-described agreements, or any substitute or successor agreements to them which provide for the making of employer contributions to this Fund.

#### **Section 2. Contribution:**

The payment made or to be made to the Fund by any Individual Employer under the provisions of the Collective Bargaining Agreement. [95] The term "Contribution" shall also include any payment made or to be made on behalf of any employee-member of Union or a Local Union or on behalf of an employee in a supervisory capacity.

#### **Section 3. Employee:**

Any employee whether union or non-union of an Individual Employer who performs one or more hours of work of the type covered by the Collective Bargaining Agreement, any employee-member of Union or a Local Union, any supervisor who formerly performed work of the type covered by the Collective Bargaining Agreement and who supervises such employees and those employees of this Fund and any other jointly administered trust fund established pursuant to the Collective Bargaining Agreement who, by res-

olution duly adopted by the Board of Trustees of the employing Trust Fund, are specifically designated to receive the benefits set forth in this Trust Agreement.

**Section 4. Employer:**

The following associations which are parties to this Trust Agreement: OREGON-COLUMBIA CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.; LONGVIEW-KELSO CONTRACTORS ASSOCIATION; EUGENE CONTRACTORS ASSOCIATION; PORTLAND HOME BUILDERS ASSOCIATION; VANCOUVER CONTRACTORS ASSOCIATION; INTERIOR BUILDERS ASSOCIATION; and certain other associations of contractors that may become signatories hereto and their respective successors and assigns.

**Section 5. Individual Employer:**

An employer who is required by the Collective Bargaining Agreement to make contributions to the Fund, Union and Local Unions who employ employee-members.

**Section 6. Signatory Association:**

Any employer organization, other than Employers, which signs the Trust Agreement on behalf of its members or executes on behalf of such members a written acceptance of and agreement to be bound by the terms of the Trust Agreement.

**Section 7. Fund:**

Trust fund created and established by the Trust Agreement.

**Section 8. Local Union:**

Any local union affiliated with Union.

**Section 9. Union:**

The following union entities which are parties to this Trust Agreement: OREGON STATE COUNCIL OF CARPENTERS; PORTLAND & VICINITY DISTRICT COUNCIL OF CARPENTERS; SOUTHWEST WASHINGTON DISTRICT COUNCIL OF CARPENTERS; PILE DRIVERS, BRIDGE, DOCK AND WHARF BUILDERS of the UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA.

**Section 10. Trust Agreement:**

This agreement and any modification, amendment, extension, supplementation or renewal thereof.

**Section 11. Trustee:**

Any natural person designated as a trustee pursuant to Article III hereof.

**Section 12. Pensioner:**

Any employee, as defined in Section 3 hereof, who has terminated said employment and is entitled to benefits from the Trust Fund under the Pension Plan.

**Section 13. Plan:**

The Pension Plan created pursuant to the Collective Bargaining Agreements and this Trust Agreement and any modification, amendment, extension, supplementation or renewal of said Plan.

In construing the terms and their definitions in this Article I, the singular shall include the plural and the plural the singular as circumstances may require.

**ARTICLE II****Purpose and Application of the Fund**

**Section 1.** There is hereby created the Oregon-Washington Carpenters-Employers Trust Fund which shall consist of all contributions made for the establishment and maintenance of the Plan, investments made and held by the Trustees, and all interest, income and other returns thereon of any kind whatsoever, and any other property received or held by the Trustees pursuant to this Trust Agreement.

**Section 2.** This Trust Fund is created for the purpose of assisting Employees and their beneficiaries in providing a life income for their support when they shall have retired from the industry, as may be determined by the Board of Trustees pursuant to the provisions of the Pension Plan. The Board of Trustees shall establish in the Plan such eligibility requirements and benefit schedules as it may from time to time deem appropriate.

**Section 3.** The Fund shall have its principal office in the city of Portland, County of Multnomah, State of Oregon. The venue for all causes of action or proceedings involving the Trust Fund brought in the State of Oregon shall be laid

in Multnomah County, Oregon and the venue for those causes of action or proceedings brought in the State of Washington shall be laid in Clark County, Washington.

**Section 4.** No Employee, Pensioner or beneficiary under the Pension Plan shall be entitled to receive any part of the contributions made or required to be made to the Trust Fund in lieu of the benefits provided by the Pension Plan. All rights of any Employee, Pensioner or beneficiary under the Pension Plan shall be limited to the benefits provided by the Pension Plan as fixed and determined by the Board of Trustees.

**Section 5.** Neither the Employers, any Signatory Association, any Individual Employer, the Union, any Local Union, any Employee, Pensioner nor beneficiary under the Plan nor any other person shall have any right, title or interest in or to the Fund other than as specifically provided in this Trust Agreement or in the Plan. Neither the Fund nor any contributions to the Fund shall be in any manner liable for or subject to the debts, contracts or liabilities of any Employers, any Signatory Association, any Individual Employer, the Union, any Local Union, nor any Employee, Pensioner or beneficiary, under the Plan. No part of the Fund nor any benefits payable in accordance with the Pension Plan shall be subject in any manner to voluntary transfer or transfer by operation of law or otherwise, and shall be exempt from the claims of creditors or other claimants and from all orders, decrees, garnishments, executions or other legal or equitable process or proceedings to the fullest extent permissible by law.

**Section 6.** Neither the Employers, Union, Local Union nor any Signatory Association, nor officer, agent, employee or committee member of the Employers, Union, Local Union or any Signatory Association, shall be liable to make contributions to the Fund or be under any other liability to the Fund or with respect to the Plan, except to the extent that he or it may be an Individual Employer required to make payments to the Fund with respect to his or its own individual or joint venture operations or to the extent he may incur liability as a Trustee as hereinafter provided. The liability of any Individual Employer to the Fund, or



with respect to the Plan, shall be limited to the contributions required by the Collective Bargaining Agreement or Trust Agreement (including the payments as required by the Trustees as authorized by the Collective Bargaining Agreement) with respect to his or its individual or joint venture operations, and in no event shall he or it be liable or responsible for any portion of the contributions due from other Individual Employers. The Individual Employers shall not be required to make any further contributions to the cost of operation of the Fund or of the Plan, except as herein elsewhere provided. This section shall only apply to the extent permitted by law.

**Section 7.** To the extent permitted by law, neither the Employers, any Signatory Association, any Individual Employer, the Union, any Local [96] Union, nor any Employee, Pensioner or beneficiary under the Pension Plan shall be liable or responsible for any debts, liabilities or obligations of the Fund or of the Trustees.

**Section 8.** Contributions to the Fund shall be due commencing June 1, 1962 for work on and after that date and shall be payable at the principal office of the Fund in Portland, Oregon in regular monthly installments starting on or before July 25, 1962, and continuing from month to month thereafter subject to the provisions of the Collective Bargaining Agreement. The contribution payable on or before July 25, 1962 shall include all payments which have theretofore accrued for work performed during the period from June 1, 1962 up to the close of the Individual Employer's payroll period ending closest to the last day of that month, and thereafter each monthly contribution shall include all payments which have accrued in the interim for work performed up to the close of the Individual Employer's payroll period ending closest to the last day of the preceding calendar month. Each monthly contribution shall be accompanied by a report in a form prescribed by the Board of Trustees.

**Section 9.** Each contribution to the Fund shall be made promptly, and in any event made so as to be received at the principal office of the Fund on or before the 25th day of the calendar month in which it becomes payable, on which date



said contribution, if not then paid in full, shall be delinquent. If any Individual Employer fails to make his or its monthly contribution in full on or before the 25th day of the month on four occasions within any 12-month period, the Board of Trustees may provide by resolution that thereafter during the 12-month period immediately following such resolution the 10th day of the month shall be the delinquency date for such Individual Employer. The parties recognize and acknowledge that the regular and prompt payments of Individual Employer contributions to the Fund is essential to the maintenance in effect of the Plan, and that it would be extremely difficult and impracticable to fix the actual expense and damage to the Fund and to the Plan which would result from the failure of an Individual Employer to pay such monthly contributions in full within the time above provided. Therefore, the amount of damage to the Fund and the Plan resulting from any such failure shall be the sum of 10 per cent of the amount of the contribution or contributions due, which amount shall become due and payable to the Fund as liquidated damages and not as a penalty, in Portland, Oregon, upon the day immediately following the date on which the contribution or contributions become delinquent and shall be in addition to said delinquent contribution or contributions.

In addition to the foregoing, interest shall accrue at the rate of 1 per cent a month on all delinquent contributions from the due date of the contribution until paid.

In case of failure of an Individual Employer to make required contributions to this Trust Fund the Trustees may take necessary legal action to collect such withheld contributions as well as costs of such action and any damages to the Fund or Plan caused by such failure to make said contributions. Continued failure to make prompt payments to the Fund or failure to make required payments shall be deemed to be a breach of the Collective Bargaining Agreement by the Individual Employer, and, in such event, the parties to this Trust Agreement may jointly or severally bring action against the Individual Employer in law or in equity or may use other economic action to either compel the performance of this Trust Agreement as well as the

Collective Bargaining Agreement, or as well to require the Individual Employer to make any and all payments due or to become due by him under the terms of this Trust Agreement.

**Section 10.** The Fund shall be administered by the Board of Trustees for the exclusive benefit of Employees, Pensioners, and beneficiaries pursuant to the provisions of the Plan. Notwithstanding anything to the contrary contained in this Trust Agreement or in the Pension Plan any modification, amendment, extension or renewal hereof or of the Plan, no portion of the Fund shall at any time revert to, or be recoverable by any of the Employers, any Signatory Association, any Individual Employer, any Union or Local Union or be used for or diverted to purposes other than for the exclusive benefit of Employees, Pensioners, or beneficiaries under the Plan, and the payment of the administrative expenses of the Fund and the Plan or refund of erroneous payments.

### ARTICLE III

#### Board of Trustees

**Section 1.** The Fund shall be administered by the Board of Trustees which shall consist of five Trustees representing employers and five Trustees representing employees. The Trustees representing employers shall be appointed by Employers in accordance with the following provisions: Three Employer Trustees shall be selected by and representing the Oregon-Columbia Chapter, The Associated General Contractors of America, Inc.; one Employer Trustee shall be selected by and representing the Portland Home Builders Association; and one employer Trustee shall be selected by and representing such other Employers as a group. Each Employer Trustee shall have his appointment confirmed by an instrument in writing by the respective Employer or group of Employers as provided above directed to each of the other parties hereto.

The Trustees representing employees shall be appointed by Union parties hereto, in accordance with the following provisions: One Employee Trustee shall be a member in good standing of, selected by and representing Oregon

State Council of Carpenters; one Employee trustee shall be a member in good standing of, selected by and representing the District Council of Carpenters of Portland and Vicinity; one Employee Trustee shall be a member in good standing of, selected by and representing Southwest Washington District Council of Carpenters; and one Employee Trustee shall be a member in good standing of one of the Local Unions of Pile Drivers, Bridge, Dock & Wharf Builders parties hereto selected by and representing such Local Unions as a group. The remaining Employee Trustee shall be a member in good standing of the Union, selected by and representing the Union at large on the Board of Trustees.

Each such Employee Trustee shall have his appointment confirmed by an instrument in writing by the respective Union entity directed to each of the other parties hereto. The Trustee selected to represent Union at large shall have his appointment confirmed by an instrument in writing by all of the Union entities directed to the other parties hereto.

The Employer and Employee Trustees so appointed shall sign this Trust Agreement, or a duplicate thereof, and such signatures shall constitute their acceptance of office and agreement to act under and be subject to all the terms and conditions of this Trust Agreement.

\* \* \*

[97]

#### ARTICLE IV

##### Functions and Powers of the Board of Trustees

Section 1. The Board of Trustees shall have the power to administer the Fund and to administer and maintain the Plan in effect, having and performing all powers and duties reasonably necessary to maintain and operate the Plan in such a way as to accomplish its objectives. The detailed basis on which pension benefits are to be paid shall be as set forth in the Appendix attached hereto and designated as the Pension Plan of the Oregon-Washington Carpenters-Employers Pension Trust Fund. The Board of Trustees may at any time, and from time to time, amend or modify such Plan, except that no amendment or modification may reduce any benefits payable to the Pensioners or beneficia-

ries under the Pension Plan who retire prior to such amendment or modification so long as funds are available for payment of such benefits. In no event shall any amendment or modification of the Plan cause or result in any portion of the Fund reverting to, or being recoverable by, any of the Employers, any Signatory Association, any Individual Employer, the Union or any Local Union or cause or result in the diversion of any portion of the Fund to any purpose other than the exclusive benefit of Employees, Pensioners or beneficiaries under the Pension Plan and the payment of the administrative expenses of the Fund and the Plan, or the refund of erroneous payments.

**Section 2.** The Board of Trustees shall have the power to construe the provisions of this Trust Agreement and the Plan and any such construction adopted by it in good faith shall be binding upon any and all parties and persons affected thereby.

**Section 3.** The Board of Trustees shall have the power to administer the Fund and to administer and maintain the Plan in effect.

**Section 4.** The Board of Trustees shall collect and receive all contributions to the Fund, and it shall promptly deposit such contributions in a special Trust Fund account or accounts established in a reputable bank or banks located in the city and county of the principal office of the Fund, or in any other city or county within the area covered by the Collective Bargaining Agreement in effect between the parties hereto.

**Section 5.** The Trustees shall have the power to demand and enforce prompt payment to the Fund, including contributions due to delinquencies as provided in Section 9 and 10 of Article II, and to assert and enforce all priorities, lien rights, and other claims or rights with respect to any contributions belonging to the Fund, this trust or any of its beneficiaries, including the rights to file priority and other claims in bankruptcy. If any Individual Employer defaults in the making of such contributions and if the Board consults or causes to be consulted legal counsel with respect thereto, or files or causes to be filed any suit or claim with respect thereto, there shall be added to the obligation

of the Individual Employer who is in default, reasonable attorneys' fees, court costs and all other reasonable expenses incurred in connection with such suit or claim, including any and all appellate proceedings therein.

\* \* \*

[100]

## ARTICLE VIII General Provisions

\* \* \*

**Section 10.** In the establishment and maintenance of the Plan, and in the execution, amendment and implementation of this Trust Agreement, Employers act for and on behalf of the Individual Employers except Union and Local Unions who, at the time of the execution of this Trust Agreement are, or during the term thereof become members of any of the Employers, or of any signatory Association for and on behalf of any other Individual Employer except Union and Local Unions who is required by the Collective Bargaining Agreement to make contributions to the Fund or who in fact makes one or more contributions to the Fund. Every agreement or act of the Employers in connection with the establishment, maintenance and operation of the Fund or the Plan shall be deemed to be and is the agreement or act of the Individual Employers, or Individual Employer, except Union or Local Unions concerned or affected by such agreement or action.

\* \* \*

[101]

## ARTICLE IX Non-Member Employers

**Section 1.** The parties acknowledge that in order for the Plan to operate successfully and equitably all Individual Employers performing work within the coverage and jurisdiction of the Collective Bargaining Agreement should make contributions to the Fund equivalent to those required by the Collective Bargaining Agreement, whether or not they are members of, or represented by, Employers or any Signatory Association.

**Section 2.** Any Individual Employer who executes a Collective Bargaining Agreement, assumes and shall be bound by all the obligations imposed by this Trust Agreement

upon the Individual Employer, is entitled to all rights under this Trust Agreement and is otherwise subject to it in all respects.

## **ARTICLE X**

### **Amendment and Termination**

**Section 1.** The provisions of this Trust Agreement may be amended or modified at any time, or from time to time, by mutual agreement of Employers and Union, subject to the terms and conditions of the Collective Bargaining Agreement any applicable law or regulation. Signatory Associations, Individual Employers, Local Unions, Employees, Pensioners, and beneficiaries under the Plan shall be bound by such amendments and/or modifications.

**Section 2.** The provisions of this Trust Agreement shall continue in effect during the term of the Collective Bargaining Agreement and any amendments, modifications, renewals, extensions thereof with respect to such Collective Bargaining Agreement as provide for the continuation of contributions into the Fund and of the Plan.

**Section 3.** This Trust Agreement and the Trust herein provided may be terminated by Employers and Union by an instrument in writing executed by mutual consent at any time subject to the provisions of Section 6 of this article.

**Section 4.** In no event shall the Trust established by this Trust Agreement continue for a longer period than is permitted by law.

**Section 5.** Upon the termination of the Trust, any monies remaining in the Fund after the payment of all expenses and obligations of the Trust shall be paid or used for the continuance of one or more pension benefits in accordance with the provisions of the Pension Plan until the Fund is exhausted.

**Section 6.** In no event shall any amendment or modification of this Trust Agreement, or the termination of this Trust Agreement or the Trust, cause or result in any portion of the Fund reverting to, or being recoverable by, any of the Employers, any Signatory Association, any Individual Employer, Union or any Local Union, or cause or result in the diversion of any portion of the Fund to any purpose other than the exclusive benefit of Employees,



Pensioners and beneficiaries under the Plan and the payment of the administrative expenses of the Fund and the Plan.

IN THE WITNESS WHEREOF, this Agreement has been executed as of the day and year first above written.

FOR THE UNION:

OREGON STATE COUNCIL OF CARPENTERS,  
PORTLAND & VICINITY DISTRICT COUNCIL OF CARPENTERS,  
SOUTHWEST WASHINGTON DISTRICT COUNCIL OF CARPENTERS and the PILEDRIVERS,  
BRIDGE, DOCK & WHARF BUILDERS & DIVERS.

Roy W. Coles

Donald C. Staudenmier

Harold G. Hansen

A. J. Darling

FOR THE EMPLOYER:

OREGON-COLUMBIA CHAPTER, THE ASSOCIATED  
GENERAL CONTRACTORS OF AMERICA, INC.

George H. Lord

Richard Geary

Kenneth W. Twedt, Manager

EUGENE CONTRACTORS ASSOCIATION

Avon Lee Babb

ASSOCIATED INTERIOR CONTRACTORS OF OREGON  
AND SOUTHWEST WASHINGTON, INC.

David O. Johnson, President

SOUTHWEST WASHINGTON CONTRACTORS ASSOCIATION, INC.

James R. Watts, Attorney

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PORTLAND & VICINITY

DISTRICT COUNCIL OF CARPENTERS

Donald C. Staudenmier, Executive Secretary-Treasurer

OREGON STATE COUNCIL OF CARPENTERS

Roy W. Coles, Executive Secretary-Treasurer

HOME BUILDERS OF

METROPOLITAN PORTLAND

Rychen Paddock, Director



[103] [Exhibit Three to PBGC Memorandum of Points  
and Authorities]

OREGON-WASHINGTON CARPENTERS-  
EMPLOYERS PENSION TRUST FUND

MULTIEMPLOYER PENSION PLAN AMENDMENTS  
ACT OF 1980

Compliance Policy

July 28, 1981

[104] OREGON-WASHINGTON CARPENTERS-  
EMPLOYERS PENSION TRUST FUND  
MULTIEMPLOYER PENSION PLAN AMENDMENTS  
ACT OF 1980

COMPLIANCE POLICY

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[107]

## I

**Multiemployer Plan Status**

The Oregon-Washington Carpenters-Employers Pension Trust Fund and the related Revised Pension Plan constitute a multiemployer plan as it is a plan to which more than one employer is required to contribute and which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer. Employee Retirement Income Security Act of 1974, as amended ("ERISA"), Sections 3(37)(A) and 4001(a)(3) and Internal Revenue Code of 1954, as amended ("Code"), Section 414(f).

## II

**Building and Construction Industry Plan Status**

The Carpenters Pension Plan primarily covers employees in the building and construction industry. The Plan is maintained primarily pursuant to the Carpenters Master Labor Agreement which governs:

"\* \* \* all types of construction work coming within the jurisdiction of the United Brotherhood of Carpenters and Joiners of America as recognized by the AFL-CIO Building and Construction Trades Department." Carpenters Master Labor Agreement Article II, Section 1.

## III

**Controlled Group of Employers**

For purposes of determining whether an employer has withdrawn and the attendant withdrawal liability, all trades or businesses under common control (a "controlled group") are treated as a single employer. ERISA Section 4001(c)(1).

[108] A controlled group exists in the following situations:

(a) *Parent-Subsidiary Group.* A "parent-subsidiary" controlled group of trades or businesses exists if one or more chains of organizations is connected through ownership of a *controlling interest*. A controlling interest is ownership of 80 percent of the stock voting power or 80 percent of the value of all stock of a corporation, an actuarial interest of at least 80 percent of a trust or estate, 80 percent of

the profits or capital interest of a partnership or 100 percent of a sole proprietorship.

(b) *Brother-Sister Group*. A "brother-sister" controlled group of trades or businesses exists if the same five or fewer persons own a controlling interest in two or more organizations and there is *effective control* of each organization to the extent of identical ownership. Effective control is the same as a "controlling interest" for a parent-subsidiary group except that the applicable percentage is 50 percent rather than 80 percent.

(c) *Combined Group*. A "combined group" of trades or businesses exists if with respect to any group of three or more organizations each organization is a member of a parent-subsidiary or brother-sister group and at least one of the organizations is the common parent of a parent-subsidiary group and is also a member of a brother-sister group.

Code Section 414(c) and IRS Reg. § 11.414(c)-1 and 2.

[109]

#### IV

#### Withdrawal

(a) *Building and Construction*. If substantially all the employees, with respect to whom an employer has an obligation to contribute, perform work in the building and construction industry, a *complete* withdrawal occurs if:

"(A) an employer ceases to have an obligation to contribute under the plan, and

"(B) the employer—

"(i) continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required, or

"(ii) resumes such work within 5 years after the date on which the obligation to contribute under the plan ceases, and does not renew the obligation at the time of the resumption." ERISA Section 4203(b)(2).

A *partial* withdrawal occurs for such a building and construction industry employer only if:

"\* \* \* the employer's obligation to contribute under the plan is continued for no more than an insubstantial portion of its work in the craft and area jurisdiction of

the collective bargaining agreement of the type for which contributions are required." ERISA Section 4208(d).

(b) *Nonbuilding and Construction*. If substantially all the employees with respect to whom an employer has an obligation to contribute *do not* perform work in the building and construction industry, a *complete* withdrawal occurs if an employer:

"(1) permanently ceases to have an obligation to contribute under the plan, or

"(2) permanently ceases all covered operations under the plan." ERISA Section 4203(a).

[110] A *partial* withdrawal occurs for such a nonbuilding and construction industry employer only if:

"(1) there is a 70-percent contribution decline (effective July 1, 1982), or

"(2) there is a partial cessation of the employer's contribution obligation." ERISA Section 4205(a).

A 70-percent contribution decline and a partial cessation of the employer's contribution obligation are defined at ERISA Section 4205(b)(1) and (2).

(c) *Date of Withdrawal*.

"[T]he date of a complete withdrawal is the date of the cessation of the obligation to contribute or the cessation of covered operations." ERISA Section 4203(e).

A partial withdrawal occurs on the last day of the plan year in which the last event causing the partial withdrawal occurred. ERISA Section 4205(a).

(d) *Sale of Assets*. A complete or partial withdrawal does not occur solely because of a sale of employer assets that complies with ERISA Section 4204.

That asset sale rule does not typically apply to a noncontrolled group building and construction employer as after the asset sale the employer does not continue craft work on a nonbargained basis within the five-year period. That asset sale rule may apply to a nonbuilding and construction employer, and a controlled group building and construction employer who sells the assets of a bargained controlled group member and continues craft work on a

nonbargained basis through the nonbargained controlled group member.

[111] Immediate, complete or partial withdrawal liability can be avoided upon a bona fide, arm's length sale of assets to an unrelated purchaser if:

(1) The purchaser contributes for substantially the same number of covered hours as the seller.

(2) The purchaser provides the Trust Fund with a qualifying five-year bond or escrow in the amount provided in ERISA Section 4204(a)(1)(B) which is payable if the purchaser withdraws or fails to make a contribution when due during the five-year period.

(3) The sale contract provides for seller secondary liability if the purchaser has a withdrawal during the five-year period.

The seller must provide a qualifying bond or escrow if substantially all its assets are distributed or it is liquidated before the end of the five-year period.

## V

### Withdrawal Liability Allocation Formula

(a) *Presumptive Method.* As the Carpenters Pension Trust Fund primarily covers employers in the building and construction industry, the ERISA Section 4211(a) presumptive method is the method by which employer withdrawal liability is allocated. The ERISA Section 4211(c) optional methods are limited to nonbuilding and construction industry plans.

An employer's withdrawal liability on complete withdrawal is the sum of (1), (2) and (3), minus (4) as follows:

[112] (1) *Pre-Act Unfunded Vested Benefits.*

Unamortized 6-30-79	Withdrawing Employer	
Unfunded Vested	Contributions Required	
Benefits	$\times$ 7-1-74 thru 6-30-79	= \$ ____
	Total Employer Contributions made 7-1-74 thru 6-30-79	



(2) *Annual Unfunded Vested Benefits Change.*

Unamortized Annual Unfunded Vested Bene- fit Change	×	Withdrawing Employer Contributions In Year of Change and Four Prior Years	=	\$_____
		Total Employer Contri- butions Made In Year of Change and Four Prior Years		

A separate formula must be used for each plan year after June 30, 1979. The annual unfunded vested benefit change is the amount by which:

(A) The plan year-end unfunded vested benefits;  
exceeds:

(B) The sum of:

(i) The unamortized June 30, 1979, unfunded vested benefits, and

(ii) The sum of the unamortized amounts of the change in unfunded vested benefits for each plan year after June 30, 1979, and before the plan year for which the change is determined.

[113] (3) *Reallocated Unfunded Vested Benefits.*

Unamortized, Reallocated Unfunded Vested Benefits End of Plan Year Prior To Withdrawal	×	Withdrawing Employer Contributions In Year of Change and Four Prior Years	=	\$_____
		Total Employer Contri- butions Made In Year of Change and Four Prior Years		

Reallocated unfunded vested benefits are the sum of the:

(A) Amount the Board of Trustees determines uncollectible for reasons arising out of bankruptcy or similar proceedings,

(B) Amount the Board of Trustees determines will not be assessed because it is de minimis, it exceeds the 20-year payment cap or it arises from an asset sale for which withdrawal liability cannot be collected under ERISA Section 4225, and the

(C) Amount the Board of Trustees determines uncollectible or unassessable for other reasons under

Pension Benefit Guaranty Corporation ("PBGC") regulation standards.

(4) *De Minimis Withdrawal Liability*. The foregoing employer withdrawal liability shall be reduced by:

(A) The smaller of:

(i) "¼ of 1 percent of the plan's unfunded vested obligations (determined as of the end of the plan year ending before the date of withdrawal), or"

(ii) "\$50,000," minus

[114] (B) " \* \* \* the amount, if any, by which the \* \* \* [employer's withdrawal liability] exceeds \$100,000." ERISA Section 4209(a).

An employer's withdrawal liability on partial withdrawal is a pro rata portion of his complete withdrawal liability based on covered hours as provided at ERISA Section 4206.

(b) *Elements of Withdrawal Liability Formula*.

(1) *Unfunded Vested Benefits*. Unfunded vested benefits are the value of nonforfeitable Plan benefits, less the value of Trust assets. ERISA Section 4213(c). As determined by the Plan actuary, the value of nonforfeitable Plan benefits is based on the actuarial assumptions and methods of the Trust Fund's most recent actuarial valuation, except that, to the extent the value of Trust assets covers total vested benefits, the withdrawal liability for those benefits are valued at varying interest rates determined by the Plan actuary depending on the period left until retirement. ERISA Section 4213(a) and (b).

Unamortized vested benefits are the foregoing unfunded vested benefit amounts, amortized at 5 percent a year. ERISA Sections 4211(b)(2)(C), (D) and 4211(b)(4)(C).

(2) *Contributions*.

(A) *Five-Year Period*. The numerator and denominator of the foregoing withdrawal liability fractions are determined using a five plan year period rather than an up to [115] ten-plan year period as permitted by ERISA Section 4211(c)(5)(C). A more lengthy period would not more equitably allocate withdrawal li-

ability and increases Trust Fund administrative costs.

(B) *Modified Accrual*. The contribution amount of the numerator and denominator of the foregoing withdrawal liability fractions is determined on a modified accrual basis. Contributions received in July for June hours and delinquent contributions for the prior plan year made in July and August are deemed made for the prior plan year.

(C) *Denominator Exclusion*. Because of the large number of small employers who contribute to the Trust Fund and their high turnover rate, only the contributions of "significant withdrawn employers" are excluded from the denominator of the withdrawal liability fractions. ERISA Section 4211(c)(5)(D) and 29 CFR § 2652.6(c) and Carpenters Revised Pension Plan Amendment No. 6, Section 12.02. Exclusion of the contributions of all withdrawn employers would result in substantial administrative expense for which there is no clear benefit to participants and beneficiaries.

[116] A "significant withdrawn employer" is an employer to whom the Trust Fund has sent a notice of withdrawal liability or an employer who in any plan year used to determine the withdrawal liability fraction contributed the lesser of \$250,000 or 1 percent of all employer contributions.

A building and construction employer will be deemed to have withdrawn from the Plan prior to April 29, 1980, effective date of the Multiemployer Pension Amendments Act of 1980 ("Multiemployer Act") withdrawal liability provisions if the employer ceased contributing to the Trust Fund for a period greater than a typical cyclical shutdown as determined by the Committee, which continued through April 29, 1980, irrespective of whether there was a cessation of the labor agreement obligation to contribute.

## VI

## Monitoring Withdrawals

(a) *Potential Withdrawals.* The Fund Manager shall monitor potential withdrawals. The following occurrences indicate that an employer may have withdrawn:

(1) *Termination of Labor Agreement.* Labor agreements are terminated by advance written notice to the union pursuant to the terms of the labor agreement. The [117] Fund Manager shall arrange with the affected union to advise the Fund Manager when a termination notice is received and the effective date thereof.

Between the date the Fund Manager is notified by the filing of the termination notice and the effective date of the cessation of the labor agreement obligation to contribute, the Fund Manager shall monitor the monthly employer contribution reports to determine whether a partial withdrawal occurs in that interim period. A partial withdrawal may occur if the employer is substantially shifting his craft work to a nonunion controlled group member in anticipation of the termination of the labor agreement. If there has been a 70 percent decline in the reported contributed hours during any reasonable period, the Fund Manager shall send the employer the attached Exhibit A information request.

As soon as possible after the effective date of the termination of a labor agreement, the Fund Manager shall send the employer the attached Exhibit A information request, unless it is known that the employer has not continued craft work in the Trust Fund area without a labor agreement. The Fund Manager shall request the affected employer, association and union to advise whether such craft work has continued. If the employer has not had a withdrawal, the Fund Manager shall make a similar inquiry no later than the second, fourth and fifth anniversaries of the termination of the labor [118] agreement and at such earlier times as evidence comes to the Fund Manager's attention that craft work is being done without a labor agreement, unless it is

known that the employer has not continued craft work in the Trust Fund area without a labor agreement.

(2) *Complete Cessation of Contributions.* If an employer ceases to report any covered hours, ceases to file monthly employer reports or notifies the Fund Manager that it is filing its last employer report, the Fund Manager shall send the employer the attached Exhibit A information request, upon such cessation of contributions and a similar inquiry no later than the second, fourth and fifth anniversaries thereof in order to determine whether a partial withdrawal has occurred. Exhibit A need not be sent if the Fund Manager can reasonably confirm from an employer association or an affected union that the employer and his controlled group are not doing craft work on a nonbargained basis.

(3) *Substantial Decline In Contributions.* In order to determine if a partial withdrawal has occurred, the Fund Manager shall monitor whether any employer has a decline of 70 percent or more in reported covered hours during all or any portion of the prior two-year period. Initial monitoring can be done by comparing an employer's reported covered hours for the most recent plan year with covered hours for the prior plan year. If other facts [119] indicate a substantial decline has occurred, the employer's reported covered hours should be reviewed for such longer or shorter period as necessary.

If a 70 percent decline has occurred or other facts exist which indicate a partial withdrawal may have occurred, the Fund Manager shall send the employer the attached Exhibit A information request, unless it can be reasonably confirmed by an employer association or affected union that the employer and his controlled group are not doing craft work on a nonbargained basis.

(b) *Withdrawal Liability Committee.*

(1) *Failure To Respond To Information Request.* If an employer fails to respond to the attached Exhibit A information request or responds incompletely such that it is not possible to determine if a withdrawal has occurred, it shall be referred to the committee desig-

nated by the Board of Trustees to handle withdrawal liability matters ("Committee"). The Committee shall determine whether to direct legal counsel to seek a court order to obtain that information, to conduct a termination/withdrawal liability audit or both.

(2) *Withdrawal Determination.* The Committee shall determine whether a complete or partial withdrawal has occurred based on the information provided by the Fund Manager.

[120]

## VII

### *Calculation of Withdrawal Liability*

(a) *Fund Manager Calculation.*

(1) *Total Withdrawal Liability.* When the Committee determines that a withdrawal has occurred, the Fund Manager shall calculate the nonde [sic] minimis withdrawal liability pursuant to the formulas described in V(a) above. After obtaining the necessary information from the Fund Manager, the consultant shall annually provide the Fund Manager with those formulas, with completed dollar amounts.

(2) *Amortization Schedule.* The Fund Manager shall also prepare the amortization schedule for the employer's withdrawal liability in the form attached as Exhibit B.

The period of years necessary to amortize the withdrawal liability in level annual payments, as if the first payment is made on the first day of the plan year following withdrawal, shall be based on the assumptions used in the most recent Plan actuarial valuation. ERISA Section 4219(c)(1)(A).

The amount of the annual payment shall be determined as follows:

Average Contribution	Highest	Annual
Base Units	× Contribution Rate	= Payment

"Contribution base units" are work hours for which an employer must contribute to the Trust Fund, ERISA [121] Section 4001(a)(11). "Average contribution base units" are the average covered hours on which the employer was obligated to contribute to the Trust Fund for the three consecutive plan-year periods during the five consecutive plan years ending before withdrawal in which the required cov-



ered hours were the highest. ERISA Section 4219(c)(1)(C)(I) [sic]. The "highest contribution rate" is the employer's highest contribution rate during the five plan years ending with the plan year of withdrawal. The five-year period used in determining the "average contribution base units" and the "highest contribution rate" shall be increased by one for each plan year after June 30, 1980, up to a total of ten beginning with the July 1, 1984, through June 30, 1985, plan year and thereafter. ERISA Section 4219(c)(1)(C)(iii) and Carpenters Revised Pension Plan Article 12, Section 12.04.

The amortization schedule will provide for equal quarterly installments paid in advance. ERISA Section 4219(c)(3). The due date for the first installment shall be fixed so that it is about 60 days after the date of demand. ERISA Section 4219(c)(2).

(b) *Consultant Review*. After calculating an employer's withdrawal liability, the Fund Manager shall forward the withdrawal liability calculations and the amortization schedule to the consultant for review and confirmation.

[122]

## VIII

### *Reallocation of Withdrawal Liability*

If any withdrawal liability is not assessable because it is de minimis, it exceeds the 20-year payment cap or there is a qualifying asset sale (ERISA Section 4225), or is uncollectible for reasons arising out of bankruptcy or similar proceedings or is uncollectible or unassessable for other reasons as determined by the Committee under standards not inconsistent with PBGC regulations, it shall be reallocated to the plan year in which that determination is made. The Fund Manager shall refer any uncollectible or unassessable withdrawal liability to the Committee for such reallocation as it becomes known to the Fund Manager.



## IX

*Assessment and Collection of  
Withdrawal Liability*

(a) *Notice and Demand.* Upon confirmation of the withdrawal liability and the amortization schedule by the actuary, the Fund Manager shall send the withdrawn employer attached Exhibit C, which notifies the employer of the amount of withdrawal liability and demands payment thereof, and shall enclose therewith the Exhibit B, schedule of payments. ERISA Section 4219(b)(1).

(b) *Employer Review Request.* If the employer asks for a review of any matter relating to determination of his liability and the schedule of payments, identifies any inaccuracy in that amount or furnishes additional relevant information (ERISA Section 4219(b)(2)(A)), the Fund Manager shall refer the matter [123] to the Committee. An employer request does not affect the employer's duty to make withdrawal liability payments when due. ERISA Section 4219(c)(2). After a reasonable review, the Committee shall notify the employer through the Fund Manager of its decision, the basis for the decision and the reason for any change in the withdrawal liability amount or the schedule of payments. ERISA Section 4219(b)(2)(B).

(c) *Late Payment and Default.* If a withdrawal liability payment is not paid by the due date, the Fund Manager shall immediately send the employer the notice attached as Exhibit D. If the past-due payment with accrued interest is not paid within 60 days after the employer receives the notice, the employer shall be in default. ERISA Section 4219(c)(5)(A). A default also occurs upon the occurrence of any other event which indicates a substantial likelihood of inability to pay such as the filing of a voluntary petition in bankruptcy, an adjudication in bankruptcy or entering into a composition of creditors. ERISA Section 4219(c)(5)(B).

Immediately upon a default, the Fund Manager shall notify the employer that the total outstanding withdrawal liability, plus accrued interest on that total from the date the initial payment was not paid when due, is immediately due and payable. ERISA Section 4219(c)(5). The Fund Manager

shall also refer the matter to co-legal counsel for collection pursuant to ERISA Section 4301.

Interest on past-due payments and on the total remaining withdrawal liability in the event of default shall be charged at [124] rates based on prevailing market rates for comparable obligations in accordance with PBGC regulations, if any. ERISA Section 4219(c)(6).

## X

### *Employer Information Request*

(a) *General Information.* Upon written employer request, the Fund manager shall provide the employer, without charge, with general information necessary for the employer to compute its withdrawal liability. General information includes unamortized unfunded vested benefits, contributions made by all employers and the de minimis amount of any withdrawal liability fractions.

(b) *Estimate of Liability and Unique Information.* Upon written employer request, the Fund Manager shall provide the employer, after receipt of the reasonable cost, with an estimate of the employer's potential withdrawal liability or provide information unique to that employer. Unique information includes the contribution required of a particular employer.

## XI

### *Amendment and Scope of Policy*

This Compliance Policy can be amended from time to time by resolution of the Board of Trustees or any committee thereof to which amendment authority is delegated. This Policy shall be updated periodically as regulations are issued under and interpretations are made of the Multiemployer Act. This Policy is [125] designed for the administrative convenience of the Trust Fund and shall not be interpreted to provide greater or lesser legal requirements than provided by the Multiemployer Act and the regulations and interpretations thereunder.

[137] [Exhibit Four to PBGC Memorandum of Points  
and Authorities]

**OREGON-WASHINGTON CARPENTERS-EMPLOYERS  
PENSION TRUST FUND**

R. A. GRAY & CO.	) BOARD OF TRUSTEES
WITHDRAWAL LIABILITY	) ERISA SECTION 4219(b)(2)(A)
DETERMINATION	) REVIEW
	DECISION ON REVIEW

Attached is the Abstract of Record relating to the computation of withdrawal liability of R. A. Gray & Co. ("Gray").

In his October 12, 1981, letter to the Fund Manager (Ab. Doc. No. 23), Gray's legal counsel requested the Board of Trustees to review eight items in connection with the assessment of withdrawal liability against Gray. The decision of the Board of Trustees on those items pursuant to Section 4219(b)(2)(B) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), is set forth below in the order presented by Gray.

*Labor Dispute.* "Whether there was and remains a labor dispute." (Ab. Doc. No. 23 at A-243.)

The Board of Trustees holds that Gray did not withdraw from the Carpenters Pension Plan solely because of a suspension of contributions during a "labor dispute."

ERISA Section 4218 provides that:

"\* \* \* an employer shall not be considered to have withdrawn from a plan solely because-

\* \* \*

"(2) an employer suspends contributions under the plan during a labor dispute involving its employees."

[138] A "labor dispute" is not defined in the Multiemployer Pension Plan Amendments Act of 1980 ("Multiemployer Act") which added that ERISA Section.

The labor dispute question was first brought to the Board of Trustees' attention by the August 6, 1981, letter of Gray's counsel (Ab. Doc. No. 19) and was described further in his November 2, 1981, letter (Ab. Doc. No. 26). Gray alleged that the Oregon State Council of Carpenters and its constit-

uent locals ("Union") struck Gray commencing June 1, 1980, and have picketed intermittently since (Ab. Doc. No. 19 at A-120). Gray's counsel stated that Gray has been advised that the picketing is at least in part for recognitional purposes and that Mr. Kirkland has stated the desire of his organization to have a collective bargaining agreement. Gray filed unfair labor practice charges with respect to this conduct (Ab. Doc. No. 26 at A-268).

Gray terminated its labor agreement June 1, 1980, by February 14, 1980, letter notice to the Oregon State Council of Carpenters (Ab. Doc. No. 1 at A-4, Ab. Doc. No. 2, and Ab. Doc. No. 28 at A-277). Picketing of Gray did not begin until June 2, 1980 (Ab. Doc. No. 28 at A-277). In advance of the contract termination date, Gray distributed "financial core" letters to its employees indicating a desire to go non-union. Gray has made no contributions to the Pension Trust Fund since July, 1980. In response to a Board of Trustees' inquiry, Gray [139] notified the Board of Trustees in September, 1980, that Gray was making its final report, that it had not employed carpenters in July, 1980, and did not again anticipate employing carpenters in the future (Ab. Doc. No. 9). Gray must have meant that it was not employing Union carpenters beginning July, 1980, as Gray has admitted its continued employment of carpenters (Ab. Doc. No. 13 at A-67). Gray has not notified the Board of Trustees that it was "suspending contributions because of a labor dispute" and has not recommenced contributions to this date.

After the contract termination date, some of Gray's employees attempted to withdraw from the Union requesting "financial core" status. Some 63 percent continued Gray employment in nonbargained status and the majority of the some 37 percent who ceased Gray employment were employed by other bargained employers (Ab. Doc. No. 28 at A-277). As indicated in Gray's final Trust Fund report received September 22, 1980 (Ab. Doc. No. 9), the Carpenters Union had no members employed by Gray beginning at the latest July, 1980, and Gray did not anticipate employing any more Union carpenters. Gray indicated by June 12, 1981, letter to the Oregon State Council of Carpenters that Gray had not heard from the Council for a substantial period of

time and assumed the State Council no longer claimed to represent a majority of Gray employees. (Ab. Doc. No. 24 at A-247).

[140] There have been no negotiations between Gray and the Carpenters Unions since early June, 1980, if then, shortly after termination of the collective bargaining agreement when the Union advised Gray's legal counsel that the Union would not consider subcontractor and union security clauses (Ab. Doc. No. 24 at A-237). It does not appear that there were even negotiations in June, 1980, as the Union took a Master Labor Agreement or nothing approach (Ab. Doc. No. 4). Picketing of Gray began June 2, 1980, and appears to have been for informational purposes rather than with respect to any ongoing labor dispute or for organizational purposes (Ab. Doc. No. 28 at A-277). Picket signs indicated that Gray did not have a contract with the Union (Ab. Doc. No. 28 at A-277).

Even if there was an ongoing labor dispute after May 31, 1980, it was not the reason for Gray's cessation of contributions which resulted from Gray's termination of its collective bargaining agreement pursuant to the required February 14, 1980, advance notice. Gray's creation of a new money purchase pension plan effective March 1, 1980, and the apparent extension of coverage under that plan and Gray's pre-existing profit sharing plan effective June 1, 1980 (Ab. Doc. No. 28 at A-277), implies that Gray never intended to resume Trust Fund contributions.

*Constitutionality of Gray Withdrawal Liability Assessment.* "Whether it would be constitutionally permissible [141] to assess withdrawal liability against R. A. Gray" (Ab. Doc. No. 23 at A-243).

The Board of Trustees holds that the constitutionality of the assessment of withdrawal liability against Gray is not a matter properly within the Board of Trustees' scope of review under ERISA Section 4219(b)(2). The review procedure included in that section was adopted as a part of the Multiemployer Act. It would be inconsistent with that review procedure which presumes the constitutionality of the Multiemployer Act for the Board of Trustees to make a decision on constitutionality. Furthermore, constitutionality is

not a matter specifically within ERISA Section 4219(b)(2)(A) for review by the Board of Trustees.

*Election of Withdrawal Liability Formula.* "Whether the trustees satisfied their fiduciary responsibilities in electing the withdrawal liability formula chosen." (Ab. Doc. No. 23 at A-243).

The Board of Trustees holds that it satisfied its fiduciary responsibilities in electing the ERISA Section 4211(b) method of allocating withdrawal liability although for the reasons discussed above in connection with constitutionality, the Board's satisfaction of its fiduciary responsibilities is not properly at [sic] matter reviewable by the Board pursuant to ERISA Section 4219(b)(2)(B).

ERISA Section 4211 provides a contributions-related presumptive method for allocating unfunded vested benefits, two [142] optional contributions-related methods and an optional method which provides for allocation of unfunded vested benefits based on vested benefits attributable to the withdrawn employer and the employer's share of unattributable vested benefits. ERISA Section 4211(c)(5) provides that a plan may adopt any other alternative method for allocating unfunded vested benefits subject to Pension Benefit Guaranty Corporation ("PBGC") approval and pursuant to PBGC regulation.

ERISA Section 4211(c)(1) provides that none of the optional methods is available to a plan which primarily covers employees in the building and construction industry except to the extent provided in PBGC regulations. No such regulations have been issued and by virtue of ERISA Section 4214(a) no alternative formula could retroactively apply to Gray without its consent.

The phrase "building and construction industry" is not defined in the Multiemployer Act. The PBGC indicated in its proposed agenda of priority regulations that it would define "building and construction industry" but the regulations have not yet been issued.

The Carpenters Master Labor Agreement at Article II, Section 1, governs

"\* \* \* all types of construction work coming within the jurisdiction of the United Brotherhood of Carpen-



ters and Joiners of America as recognized by the AFL-CIO Building and Construction Trades Department." (Ab. Doc No. 1 at A-2).

[143] Based on the types of work covered by the Master Labor Agreement, the Carpenters Pension Plan primarily covers employees in the building and construction industry. (Ab. Doc. No. 18 at A-90.)

As the optional methods were not available, the Board of Trustees selected the statutory presumptive method of allocating unfunded vested benefits (Ab. Doc. No. 11 at A-58). Adoption of this presumptive method was based on the October 17, 1980, opinion of co-legal counsel and the December 22, 1980, report of the Trust Fund consultant.

*Schedule of Payments.* "Whether the schedule of payments is appropriate." (At [sic] Doc. No. 23 at A-243.)

The Board of Trustees holds that the Gray schedule of payments is appropriate.

Gray has neither identified any inaccuracy in the schedule of payments nor provided any additional information relevant thereto.

The payment schedule is set forth in the July 24, 1981, Fund Manager demand letter (Ab. Doc. No. 17). The first payment was due within 60 days of that letter and further payments on subsequent January 1, April 1, July 1 and October 1 dates with the final of the 13 payments due October 1, 1984.

ERISA Section 4219(c)(1)(A)(i) provides that the employer is to pay its withdrawal liability over the period necessary to amortize that amount in level annual payments [144] calculated as if the first payment was made on the first of the plan year following withdrawal and subsequent payments on the first day of each subsequent year. The amortization period is to be based on the plan's most recent actuarial valuation. ERISA Section 4219(c)(1)(A)(ii).

ERISA Section 4219(c)(1)(C) provides that the amount of each annual payment is the product of the employer's average covered hours in the three plan years during the ten years preceding withdrawal in which the average covered hours were the highest. The Board of Trustees chose the op-



tional period of five increasing to ten years permitted by ERISA Section 4219(c)(1)(C)(iii) (Ab. Doc. No. 11 at A-59).

ERISA Section 4219(c)(2) provides that the first withdrawal liability payment is to be made no later than 60 days after the date of demand. Each annual payment is payable in four installments due quarterly. ERISA Section 4219(c)(3). The Board of Trustees did not adopt an alternative payment interval (Ab. Doc. No. 18 at A-104).

Annual payments and the schedule were prepared by the Trust Fund consultant and set forth at Exhibit I to the demand letter (Ab. Doc. No. 17 at A-83).

The consultant's worksheet for determining the length of the payment period is based on the Plan's assumed rate of interest, 5 percent, in effect on the withdrawal date (Ab. Doc. No. 16 at A-82 and Ab. Doc. No. 15 at A-78).

[145] The November 2, 1981, letter from Gray's counsel (Ab. Doc. No. 26 at A-269) indicates that it is not clear how each of the entries in the calculation of Gray's withdrawal liability was determined. This question, though not directly raised in Gray's request for review (Ab. Doc. No. 23), most closely relates to the schedule of withdrawal liability payments which results from the calculation of Gray's withdrawal liability.

The withdrawal liability formula applicable to Gray is as follows:

		Withdrawing Employer Contributions Required 7-1-74 thru 6-30-79
Unfunded Vested Benefits 6-30-79	×	All Employer Contributions Made Made 7-1-74 thru 6-30-79 Excluding Significant Withdrawn Employers

Unfunded vested benefits are discussed in connection with the following item raised by Gray.

Both Gray's contributions in the numerator and all employer contributions in the denominator were determined using the modified accrual method used on an ongoing basis by the Trust Fund (Ab. Doc. No. 11 at A-59). Under that method all contributions received in July and any delinquent contributions received in August are credited to the prior

July 1 through June 30 plan year. All other contributions are credited to the year in which received.

ERISA Section 4211(b)(3)(B)(ii) provides that the denominator:

[146] “\* \* \* is the sum of all contributions made for the most recent 5 plan years ending before April 29, 1980, by all employers—

“(I) who had an obligation to contribute under the plan for the first plan year ending on or after such date, and

“(II) who had not withdrawn from the plan before such date.”

ERISA Section (c)(5)(D) [sic] [should be “Section 4211(c)(5)(D)”] provides that

“The corporation may by regulation permit adjustments in any denominator under this section, consistent with the purposes of this title, where such adjustment would be appropriate to ease administrative burdens of plan sponsors in calculating such denominators.”

By 29 CFR § 2652.6(c) the PBGC authorized a plan by amendment to exclude from the denominator only the contributions of “significant withdrawn employers”. The Board of Trustees adopted the significant withdrawn employer option (Ab. Doc. No. 11 at A-58 and A-59). That rule has the effect of decreasing Gray’s potential withdrawal liability, because the fewer employers excluded, the higher the denominator, and the lower Gray’s share of unfunded vested benefits. Fund Manager worksheets regarding the calculation of significant withdrawn employer contributions are set forth at Ab. Doc. No. 10. The contribution amounts excluded from the denominator are set forth in Ab. Doc. No. 14 at A-70.

*Accuracy of Actuarially Determined Unfunded Vested Benefits.* “Whether the actuarially determined unfunded vested benefits are accurate.” (Ab. Doc. No. 23.)

[147] The Board of Trustees holds that, based on the information provided, the Plan actuarially determined unfunded vested benefits are accurate.

Gray has not identified any inaccuracy in the determination of unfunded vested benefits nor provided any additional relevant information.

Unfunded vested benefits are the value of nonforfeitable plan benefits less the value of trust assets (ERISA Section 4213(c)). Withdrawal liability is to be determined on the basis of actuarial assumptions and methods which in the aggregate are reasonable and which in combination offer the actuary's best estimate of anticipated experience under the plan or actuarial assumptions and methods set forth in the PBGC's regulations (ERISA Section 4213(a)). To date the PBGC has not issued a regulation on actuarial assumptions.

In determining unfunded vested benefits, the actuary may rely on the most recent complete actuarial valuation of the plan (ERISA Section 4213(b)(1)). The actuary has relied on that valuation, including valuation assumptions, except to the extent the value of Trust assets covers total vested benefits. To that extent Plan benefits are valued at varying interest rates determined by the plan actuary from the corresponding PBGC single-employer plan termination rates depending on the period left until retirement (Ab. Doc. No. 15).

[148] *Persons not Qualified to Participate in the Plan.* "Whether portions of the actuarially determined unfunded vested benefits and/or liability relate to persons not otherwise qualified to participate in the Plan." (Ab. Doc. No. 23 at A-243).

The Board of Trustees holds, based on the information available, that the actuarially determined unfunded vested benefits do not include amounts with respect to persons not qualified to participate in the Plan.

Gray has not identified any inaccuracy in the determination of vested benefits in that regard nor has Gray provided any additional relevant information in that regard.

"Employee" is defined at Plan Section 1.06 (Ab. Doc. No. 27) as an employee performing one or more hours of work of the type covered by the Collective Bargaining Agreement, employee-members of Union or Local Unions and certain supervisory employees pursuant to regulations adopted by the Trustees. The term employee is further defined at that section to exclude "any self-employed person, whether a sole proprietor or a partner."

Employer contributions and Plan benefits are based on covered hours of service reported on the monthly employer remittance report. Instruction No. 6 of the report provides that "Contributions from self-employed carpenters cannot be accepted." (Ab. Doc. No. 27.) During June, 1980, all [149] employers were again advised that "owner-operators" are not eligible to participate in the Pension Trust Fund as they do not qualify as an "employee." (Ab. Doc. No. 27.)

Trust Fund remittance reports are reviewed by Fund Manager personnel to determine whether contributions are being made on other than employees as a function of the name of the business entity and the individuals being reported on. It is possible that certain employees with respect to which contributions have been made do not qualify as employees under the Plan. To the extent any such persons have been identified, they are not included in the unfunded vested benefit figures reported by the actuary.

*Transfer to R. A. Gray Plan.* "Whether a transfer from the Plan to the R. A. Gray Plan would be appropriate" (Ab. Doc. No. 23 at A-244.)

The Board of Trustees holds that a transfer of Plan assets and liabilities to the R. A. Gray money purchase pension plan may be appropriate but should be delayed pending issuance of PBGC asset transfer regulations in light of the noncomparability of the two plans. The Board of Trustees further holds that any such transfer is irrelevant to a determination of Gray's withdrawal liability as only funded benefits could be transferred to a money purchase pension plan.

As a part of Gray's collective bargaining agreement termination, it established a money-purchase pension plan which [150] covers in part employees who continued Gray employment after the contract termination date and were previously covered under the Carpenters Pension Plan. Gray has provided a summary of plan provisions (Ab. Doc. No. 26 at A-270) but has not provided a copy of the plan.

ERISA Section 4234 provides that

"A transfer of assets from a multiemployer plan to another plan shall comply with asset-transfer rules which shall be adopted by the multiemployer plan and which

"(1) do not unreasonably restrict the transfer of plan assets in connection with the transfer of plan liabilities and

"(2) operate and are applied uniformly with respect to each proposed transfer \* \* \*."

The Board of Trustees has not yet adopted any asset transfer rules.

ERISA Section 4234(a)(2) provides that plan asset transfer rules consistent with ERISA Section 4232(c)(3) are considered to satisfy the asset transfer rules requirements. ERISA Section 4232(c)(3) provides that the value of liabilities transferred must not exceed the value of liabilities for benefits which accrued under the multiemployer plan and the value of assets transferred must be substantially equal to the value of assets which would have been in the single-employer plan if the employer had maintained and funded the single-employer plan as a separate plan before the date of the transfer. ERISA Section 4232(f)(1) provides that the PBGC may [151] prescribe by regulation additional requirements with respect to asset or liability transfers as may be necessary to protect the interests of plan participants and beneficiaries and the PBGC.

ERISA Section 4212(e) [sic, should be "4211(e)"] provides that, in the case of a transfer of liabilities to another plan incident to an employer's withdrawal, the withdrawn employer's liability is to be reduced in an amount equal to the value at the end of the last plan year before the withdrawal of the transferred unfunded vested benefits. Thus, even if there is a transfer of liabilities and assets, Gray's withdrawal liability to the Carpenters Pension Plan is reduced only to the extent that unfunded liabilities are transferred to Gray's money purchase pension plan.

It is doubtful that any unfunded liabilities could be transferred to the Gray money purchase pension plan. By definition, a money purchase pension plan is at all times fully funded because plan liabilities equal the sum of participants' accounts. Absent a PBGC regulation in this area, there appears to be no way to make a transfer to the Gray money purchase pension plan other than a transfer of funded vested benefits.

Even if assets and an equal amount of liabilities were to be transferred, the transfer would be limited to the value of the annuity benefits of those Carpenters Pension Plan participants who had a Gray money purchase pension plan account. Such a transfer appears unfair to remaining [152] Carpenters Pension Plan participants as it would further dilute the funding level of their benefits while the transferred participants' benefits would be fully funded.

Furthermore, before any transfer could be considered it would be necessary to review the Gray money purchase pension plan itself to determine that it permitted such transfers, and that amounts transferred would be fully vested for the former Carpenters Pension Plan participants rather than being subject to the described graded vesting schedule.

*Permanent Termination of Contribution Obligation.* "Whether there was a permanent termination of an obligation to contribute and if so, when?" (Ab. Doc. No. 23 at A-244.)

The Board of Trustees holds that Gray terminated its obligation to contribute to the Pension Trust Fund effective June 1, 1980. The Board of Trustees further holds that whether such termination was "permanent" is irrelevant although the termination was permanent June 1, 1980, and if not then by at least June 20, 1980.

ERISA Section 4203(b)(2) provides that a withdrawal occurs by a building and construction industry employer from a building and construction industry plan if

"(A) an employer ceases to have an obligation to contribute under the plan, and

"(B) the employer—

"(i) continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required, or [153]

"(ii) resumes such work within five years after the date on which the obligation to contribute under the plan ceases, and does not renew the obligation at the time of resumption."

There is no requirement that the employer "permanently" ceases to have an obligation to contribute for a withdrawal to occur from a building and construction industry plan. The



ERISA Section 4203(a)(1) "permanently ceases" requirement applies only to nonbuilding and construction industry employers.

The phrase "obligation to contribute" is defined at ERISA Section 4212(a) as

"\* \* \* an obligation to contribute arising—

"(1) under one or more collective bargaining (or related) agreements or

"(2) as a result of a duty under applicable labor-management relations law \* \* \*."

Gray's collective bargaining agreement was terminated by February 14, 1980, letter notice to the Oregon State Council of Carpenters effective June 1, 1980 (Ab. Doc. No. 1 and Ab. Doc. No. 28 at A-277). Before the termination date, Gray distributed financial core type information to its employees indicating a desire to go nonunion (Ab. Doc. No. 18 at A-245). Some Gray employees chose to leave Gray employment shortly after the termination rather than work under nonunion conditions (Ab. Doc. No. 23 at A-245). Some 37 percent left Gray employment and a majority were employed by other bargained [154] employers and some 63 percent stayed with Gray on a nonbargained basis (Ab. Doc. No. 28 at A-277).

There have been no negotiations between the Carpenters Union and Gray since early June, 1980 (Ab. Doc. No. 23 at A-246), if then. It does not appear that there were even negotiations in June, 1980, as the Union took a Master Labor Agreement or nothing approach (Ab. Doc. No. 4). Any correspondence between the Union and Gray was for information regarding the statewide agreement and did not amount to negotiations. The Master Labor Agreement was ratified and negotiations regarding that agreement completed as early as June 15, 1980 (Ab. Doc. No. 6).

Any picketing which has occurred appears to be informational rather than organizational or regarding an ongoing contract issue. Picket signs indicated that Gray had no contract with the Union (Ab. Doc. No. 28 at A-277). Although Gray performed bargaining-unit type work without a labor agreement after May 31, 1980 (Ab. Doc. No. 13 at A-66),



Gray reported to the Fund Manager that it employed no Union carpenters (Ab. Doc. No. 9) as early as July, 1980.

Even if the correspondence between Gray and the Union in early June, 1980, amounted to negotiations, they ceased as of June 20, 1980, when Gray unilaterally implemented its June 5, 1980, proposal (Ab. Doc. No. 3) retroactive to June 1, 1980 (Ab. Doc. No. 5).

[155] Gray, in fact, has made no contributions to the Pension Trust Fund since those in July, 1980, for prior hours (Ab. Doc. No. 8 at A-43 and A-44) indicating that Gray has taken the position that it had no duty to contribute under applicable labor-management relations law at least by July, 1980. As there were no ongoing negotiations in June, 1980, and Gray did not subsequently become signatory to a labor agreement, Gray had no labor-management relations law obligation to contribute for June, 1980, hours. It is not clear whether Gray's contributions in July, 1980, were for June, 1980, hours or pre-June, 1980, hours. If for June, 1980, hours, any such contributions were made by mistake and are returnable to Gray on demand within six months of the date the Board of Trustees decides they were mistaken unless Gray has a delinquency for pre-June, 1980, hours. An audit would be necessary for the Board of Trustees to determine whether the contributions received in July were proper or mistaken. Gray in fact failed to contribute for June hours to the related vacation and apprenticeship and training trust funds as required by the prior master labor agreement indicating Gray did not believe there was an ongoing contribution obligation under the prior agreement for even June, 1980.

Gray neither notified the Board of Trustees nor provided it with any information tending to indicate that the termination of its labor agreement was other than permanent, [156] even if permanence is relevant. In response to Board of Trustees' inquiry, Gray notified the Board of Trustees in September, 1980, that it was making its final employer report, no carpenters were employed in July, 1980, and Gray did not anticipate employing any carpenters in the future (Ab. Doc. No. 9). Gray must have been referring to not employing union carpenters as Gray admitted hiring carpenters

after May 31, 1980 (Ab. Doc. No. 13 at A-63). By the June 12, 1981, letter to the Oregon State Council of Carpenters, Gray counsel indicated that the parties had not communicated for a substantial period of time and Gray assumed that the State Council no longer claimed to represent a majority of Gray employees (Ab. Doc. No. 23 at A-247).

The permanence of Gray's termination of its labor agreement and the lack of any duty to contribute under labor-management relations law is further indicated by Gray's establishment of a new money purchase pension plan effective March 1, 1980, to cover the former bargaining-unit carpenters (Ab. Doc. No. 28 at A-277 and A-278). The money purchase pension plan applied apparently beginning June 1, 1980, to the 67 percent of Gray's carpenters who were subject to the union's jurisdictional claims and continued employment with Gray (Ab. Doc. No. 28 at 278). The former bargained carpenters were also apparently covered by Gray under a pre-existing profit sharing plan effective June 1, 1980 (Ab. Doc. No. 28 at A-277 and A-278).

[157]

# OREGON-WASHINGTON CARPENTERS- EMPLOYERS PENSION TRUST FUND

R. A. GRAY &amp; CO.

WITHDRAWAL LIABILITY  
DETERMINATION

BOARD OF TRUSTEES

ERISA SECTION 4219(b)(2)(A)  
REVIEW

ABSTRACT OF RECORD

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[160] SCHWABE, WILLIAMSON, WYATT,  
MOORE & ROBERTS  
Attorneys At Law

June 5, 1980

[PORTION OF LETTERHEAD OMITTED IN PRINTING]

HAND DELIVERED

Oregon Council of Carpenters  
United Brotherhood of Carpenters  
& Joiners of America  
411 N.E. 12th Avenue  
Room 105  
Portland, Oregon 97232

Re: R. A. Gray & Co.

Gentlemen:

Please find enclosed proposal of R. A. Gray & Co. After you have had a chance to review it, please call so that we can discuss it and make arrangements for meetings as necessary.

Very truly yours,

/s/

\_\_\_\_\_  
THOMAS M. TRIPLETT

TMT-AG  
ENCL.

\* \* \*

[162] SCHWABE, WILLIAMSON, WYATT,  
MOORE & ROBERTS  
Attorneys At Law

June 11, 1980

[PORTION OF LETTERHEAD OMITTED IN PRINTING]

Oregon Council of Carpenters  
United Brotherhood of Carpenters  
& Joiners of America  
411 N.E. 12th Avenue  
Room 105  
Portland, Oregon 97232

Re: R. A. Gray & Co.

Gentlemen:

On June 5, 1980, a written proposal was submitted to you on behalf of R. A. Gray & Co. To date, no response has been received. Please be advised that unless a contrary agreement is reached between R. A. Gray and the Union prior to June 20, 1980, its proposal will be implemented on that date, effective June 1, 1980. Option A on Pension and Health and Welfare benefits will be implemented for hours worked during the month of June. Effective July 1, 1980 Option B will be implemented. With respect to vacation contributions, this will be implemented on the basis of the cash in lieu and/or the payroll savings plan as indicated by individual employees.

We would hope to hear from you prior to June 20 in order to conclude an agreement. Of course, if no agreement has been reached by June 20, and implementation, as set forth above, is therefore required, it will be without prejudice to such agreement as future negotiations may produce.

Very truly yours,

/s/

\_\_\_\_\_  
THOMAS M. TRIPLETT

\* \* \*

TMT/baw



[167] SCHWABE, WILLIAMSON, WYATT,  
MOORE & ROBERTS  
Attorneys At Law

June 12, 1981

[PORTION OF LETTERHEAD OMITTED IN PRINTING]

Oregon State Council of Carpenters  
411 N.E. 12th Avenue, Room 105  
Portland, Oregon 97232

Re: R. A. Gray & Co.

Gentlemen:

We have not heard from you for a substantial period of time. It is the desire of R. A. Gray to make an increase which is similar to that set forth in the AGC contract.

It is our assumption that you no longer claim to represent a majority of the employees and therefore would not protest making the aforementioned increase. If I am wrong in this regard, I would request that you verbally advise the undersigned no later than June 16, 1981.

Very truly yours,

/s/

---

THOMAS M. TRIPLETT

TMT/baw

\* \* \*

## PORTLAND, OREGON

February 16, 1982

## TRANSCRIPT OF HEARING IN CHAMBERS

[CAPTION OMITTED IN PRINTING]

BEFORE: The Honorable James A. Redden, United States District Judge.

APPEARANCES: Mr. Thomas M. Tripplett, of attorneys for Plaintiff;

Mr. William B. Crow, of attorneys for Defendant Oregon-Washington Carpenters-Employers Pension Trust Fund.

[2] (TUESDAY, FEBRUARY 16, 1982, the following proceedings took place in chambers:)

THE COURT: All right.

MR. CROW: What Tom told me about his client's plan, as I understand it, Tom, although you gave notice of an intent to arbitrate, you reviewed your thinking and you are going to accept the trustees' findings?

MR. TRIPPLETT: Yes. I sent to the Court, I believe, the material that constituted the findings of the trustees. They found the termination occurred on June 1, 1980, and that the termination was a permanent cessation.

The other matter which is a review pertained to the appropriateness of the action of the actuary in determining the total withdrawal liability and the allocations of that liability to my client.

They also concluded that they lacked jurisdiction over the constitutional question, therefore refrained from answering that issue. I was curious to find precisely what their opinion would be; and, had it been unconstitutional, I would have accepted that determination as well.

In any event, it appears to me that there is therefore no need to arbitrate because the fact findings, [3] we are prepared to adopt. Therefore, we come squarely to the constitutional question and would thus request the matter be put

on the calendar for oral argument on the constitutional issue.

THE COURT: Okay.

MR. CROW: My response on behalf of PBGC, I talked to Mr. Fellner today and in light of what Tom said, what I reported to him, PBGC would like to respond with a memorandum of its own. It has not addressed this issue as we have. And he hadn't had time to consider the timing.

I suggested to him the only representation I would make under the circumstances was they needed not less than 30 days to file a brief.

THE COURT: What is their brief on?

MR. CROW: On the constitutionality too. We filed a cross motion for summary judgment. They asked to defer that until the other matter has been resolved.

THE COURT: They want 30 days to file a brief?

MR. CROW: He said he may need less than 30 days.

MR. TRIPLETT: We may require some time to respond after seeing what they have to say.

THE COURT: Let's give them 30-30 and then 30 for the reply. If they are a little late, it wouldn't be too serious. Tell them we are expecting it within 30 days. [4] If it is a few days late, it is not going to create a problem.

MR. CROW: As I understand it, the constitutional issue, Tom, you are questioning is the Multi-Employer Act. Your position is withdrawal liability is constitutional. We are not to get into the questions of the procedural aspect like timing of your arbitration and that sort of thing?

MR. TRIPLETT: At this point, I think that's right. I want, before committing myself in perpetuity on that, I would like to think about the question. It does occur to me in a sense, we are not at this point questioning the arbitration process, nor are we questioning the process by which the fact determinations were made, even though they might have been an unconstitutional process. I am certain we have standing to assert those.

THE COURT: I think we discussed this before. I can't remember what the results were. Are there any more appeals? Didn't they contend there were a couple of matters pending before another court elsewhere?

MR. TRIPLETT: There are.

MR. CROW: I don't think any of these are as far along as this one.

MR. TRIPLETT: I have a list if the Court is interested. There are more than thirty cases which have [5] been filed, and the only one which is close to being at this stage is before Judge Gatzendanner in Chicago, which is a somewhat unique case in which the trustees of the Teamsters Trust and the employers joined forces and sued PBGC; all of them claiming this was unconstitutional.

And Judge Gatzendanner heard arguments on cross motions for summary judgment on January 15th in Chicago and indicated a ruling would be forthcoming within thirty days. However, I inquired today and found that thirty days has a habit of getting away from you. So there has been no ruling come down.

There is also some questions that are presented in that case which may cause procedural problems which have been encountered here.

THE COURT: We will get in touch with Judge Gatzendanner in Chicago and ask that the opinion be sent here as s-on [sic] as it is issued for whatever assistance it might be.

MR. TRIPLETT: I can assist the Court on the number of cases. I do have it. I will have to have one of my people call and give you that number.

THE COURT: All right.

[CONCLUDED]

**MEMORANDUM OPINION AND ORDER  
OF DISTRICT COURT  
FILED AUGUST 11, 1982  
WAS APPENDED TO  
JURISDICTIONAL STATEMENT  
IN NO. 83-245, APP. 30A-49A**

Filed AUG 12 149 PM '82

Clerk, U.S. District Court  
District of Oregon

By \_\_\_\_\_

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

R. A. GRAY &amp; Co.,

PLAINTIFF,

vs.

OREGON-WASHINGTON

CARPENTER-EMPLOYERS

PENSION TRUST FUND

AND PENSION BENEFIT

GUARANTY CORPORATION,

DEFENDANTS.

Civil No. 81-912 RE  
JUDGMENT

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ORDERED that the defendants' motions for summary  
judgment are GRANTED.

BASED on the record this action is DISMISSED.

DATED this 12 day of Aug. 1982.

/s/ \_\_\_\_\_

CLERK, U.S. DISTRICT COURT

**OPINION OF COURT OF APPEALS  
FILED MAY 20, 1983 WAS  
APPENDED TO JURISDICTIONAL  
STATEMENT IN NO. 83-245,  
APP. 1a-29a**

**JUDGMENT OF COURT OF APPEALS  
ENTERED MAY 20, 1983 WAS  
APPENDED TO JURISDICTIONAL  
STATEMENT IN NO. 83-245,  
APP. 50a**